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In This Issue

Judge Florence Allen Proposes a Juridical World Order

Article 1 of the United Nations Charter recognizes certain "fundamental freedoms". Article 2 prohibits interference by the United Nations in the domestic affairs of any nation. In this essay, Judge Allen raises the question, how is it to be decided which of the two Articles controls when a situation arises that involves a conflict between the two? Citing the 1946 dispute between India and South Africa over the latter's discriminatory laws against its Asiatic citizens, she notes that the General Assembly handled the question rather than the International Court of Justice. Since the problem is legal, she thinks that the Court is the proper agency to hear such cases, and that in this way a world juridical order will be established. (Page 713.)

Association Presents Libraries to French, Italian Lawyers

President Frank E. Holman and Jacob M. Lashly, Chairman of the Association's Special Committee on Aid to Lawyers in War-Devastated Countries, traveled to Europe in July to present American law libraries to the lawyers of France and Italy. The libraries, gifts of the American Bar to their colleagues abroad, were received by representatives of the French and Italian Bars at ceremonies held in Paris and Rome. In this issue, we print excerpts from the addresses of the President and Mr. Lashly and the distinguished European lawyers who attended, including the Minister of Justice of the French Republic and Victor Emanuel Orlando, former Premier of Italy and the sole surviving member of the quartet of the "Big Four" chiefs of state who formulated the Versailles Treaty. (Page 717.)

Instructions to the Jury in a Confused Bigamy Proceeding

Is it possible for a man to be lawfully married to two different women at the same time in these United States? S. Tupper Bigelow, writing instructions to the jury in the mythical case of *Colorado* v. *Rawlings*, suggests that it is. In fact, in the case Mr. Bigelow poses, the defendant in a bigamy proceeding is married to one woman in New Mexico, is single in Arizona, is married to a second woman in Utah, and, apparently, is a bigamist in Colorado. All this, of course, is the result of the operation of the Full Faith and Credit Clause of the Constitution and the decisions by the Supreme Court in the two *Williams* cases. Although written in a light vein, this amusing article poses a fundamenal question: Does our law of divorce make any sense at all? (Page 728.)

J. W. Holloway, Jr., Analyzes Federal Health Insurance

The President's proposal of a program of compulsory health insurance has aroused a great dispute in the country. In this article, J. W. Holloway, Jr., Director of the American Medical Association's Bureau of Legal Medicine and Legislation, makes a careful and considered analysis of the bill now pending before Congress, explaining briefly its various provisions. Though the problems raised by the proposal are perhaps as much medical as legal, the legislation deserves the careful study and attention of every lawyer. Mr. Holloway's account is an excellent introduction to the subject, free from the calling-of-names that has characterized too much of the argument about this subject in the public press. (Page 732.)

William Logan Martin Describes the Federal Health Bill

William Logan Martin of Alabama describes the new Disability Benefits Act recently enacted by the New York legislature and compares it with the federal health insurance bill. Pointing out that the New York law is the kind of experimental legislation that the states have the constitutional power to pass, he voices doubt whether the enactment by Congress of the health insurance bill is within the framework of the Federal Constitution. He sees in the bill and in similar welfare legislation a growing trend toward a welfare state, and warns that immediate action is necessary if this extreme change in our form of government is to be avoided. (Page 735.)

The Second of Ben W. Palmer's Essays on "The Ancient Roots of the Law"

In the August issue of the JOURNAL (35 A.B.A.J. 633), Ben W. Palmer began the story of the fictitious but typical Billy Swift, modern American, a man free of the influence and inhibitions of the past. This is the second article on Mr. Swift, who, despite his own belief, is very much a child of past generations, as Mr. Palmer demonstrates by citing examples of modern legal rules and institutions which originated hundreds of years ago in Europe, Asia and Africa. As usual, Mr. Palmer combines humor and a vivid literary style with scholarship and careful thought. (Page 744.)

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Human Rights and the International Court:

The Need for a Juridical World Order

by **Florence E. Allen** • Judge of the United States Court of Appeals for the Sixth Circuit

▪ The Declarations of Human Rights made or proposed by the United Nations raise a multitude of intricate and difficult problems. Judge Allen points out that many of these problems are legal problems, but that so far international action taken on situations arising under the Declarations has been by the U. N.'s General Assembly, and not by the International Court of Justice. She believes that the sharp conflict between the "fundamental freedoms" recognized in Article 1 of the United Nations Charter and the seventh paragraph of Article 2, which forbids U. N. intervention in the domestic affairs of any state, presents legal questions that a court alone is competent to settle. Taken from a paper read at the Sixth Conference of the Inter-American Bar at Detroit on May 26, Judge Allen's essay is interesting and enlightening.

▪ Andrew Jackson, when he was a judge, used to charge his juries, "Do right between these parties; that is what the law really means."

The protection of human rights has always been basic in the advance of civilization. Surely human rights will be protected in the highest sense by the prevention of war. The substitution of law for war will ultimately prevent war. I therefore make one basic assumption in this discussion; that the establishment of juridical processes among the nations is as essential to the prevention of war as the establishment of courts was to the elimination of private warfare, the duel and individual killing in general.

There are three sets of Declarations of Human Rights made or proposed in connection with the organization of the United Nations. The first is part of the Charter of the United Nations. The second is proposed as an International Covenant on Human Rights intended to be submitted to and ratified by the individual states, members of the United Nations, and binding only in case of such ratification. The third is the International Declaration of Human Rights adopted by the Assembly of the United Nations as a recommendation for the guidance of members but not binding on them.

The proposed Covenant, as often stated, deals exclusively with civil rights, is intended to constitute a legally binding obligation and embodies the usual provisions of a Bill of Rights. Proposed Articles 2 and 3 are revolutionary, from the standpoint of international law, in their attempt to implement the guaranties of the Covenant. They read:

ARTICLE 2

Every state, party hereto, undertakes to ensure:

(a) that its laws secure to all persons under its jurisdiction, whether citizens, persons of foreign nationality, or stateless persons, the enjoyment of these human rights and fundamental freedoms;

(b) that such laws respecting these human rights and fundamental freedoms conform with the general principles of law recognized by civilized nations;

(c) that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(d) that such remedies shall be enforceable by a judiciary whose independence is secured; and

(e) that its police and executive officers shall act in support of the enjoyment of these rights and freedoms.

ARTICLE 3

On receipt of a request to this effect from the Secretary-General of the United Nations made under the authority of a resolution of the General Assembly, the Government of any party to this Covenant shall supply an explanation as to the manner in which the law of that state gives effect to any of the provisions of this Covenant.

The International Declaration of Human Rights covers not only civil rights but makes new and sweeping declarations of social and economic rights.

India-South Africa Dispute Illustrates Points

There is so much to say about any

one of these declarations that I must narrow this particular inquiry. As Dr. Herbert W. Briggs of Cornell University says, "Few will question the desirability of focussing attention on human rights and fundamental freedoms." Heartily concurring in this statement, I propose to address my paper to three points and illustrate them by the proceedings in the Indian-South African dispute of 1946-47 before the Assembly of the United Nations.

My points are:

(1) That, as shown by the Indian-South African case, a majority of the members of the United Nations think the Charter recognition of human rights as to fundamental freedoms imposes legally enforceable obligations rather than being a statement of purpose and aspiration.

(2) That a majority of the members of the United Nations consider that the general statements in the Charter on fundamental freedoms make any discrimination by a nation among its citizens in violation of the standards of those freedoms a matter not merely of international concern but one governed by international law.

(3) They think decision of these legal questions of surpassing importance should be dealt with, not by the Court, but by the Assembly. But, surely, if the declarations of the Charter and the other more specific statements of the International Declaration of Human Rights and of the proposed Covenant constitute enforceable international obligations, they require the authoritative interpretation of a court.

The effort to guarantee human rights in tense international situations is not the first in history. It was attempted to be dealt with on a large scale in the minority treaties entered into after World War I.

World War I Peace Treaties Protected Minorities

After World War I territorial boundaries were aligned and large numbers of persons, estimated at some fifty millions, particularly in Central Europe, were consequently dislocated. Italy received large numbers of Austrians and Yugoslavs, Yugoslavia and Greece had Bulgarians placed under their jurisdiction, Poland received Germans, Russians and Ukrainians, and Hungarians were scattered throughout Yugoslavia, Czechoslovakia, and Rumania. The Covenant of the League of Nations did not cover these situations, but the peace treaties endeavored to give guaranties for the protection of minorities thus endangered. For instance, in Article 93 of the Versailles Treaty, Poland agreed to, and later did, enter into a treaty with the Allied Powers to protect the interest of inhabitants of Poland who might differ from the majority of the population in race, language or religion. Similar minority treaties were negotiated with the new states, Yugoslavia and Czechoslovakia, and with Rumania, Austria, Hungary and Bulgaria.

In the Polish minority treaty Poland agreed that the minority guaranties should constitute obligations of international concern under the guaranty of the League and that any dispute of law or fact with reference to these guaranties should be a dispute of an international character, and should, if the other party demanded, be referred to the Permanent Court of International Justice. It agreed that the decision of the Permanent Court should be final and have the effect of an award. However, no oppressed minority could bring these matters to the attention of the council. The result was that the oppressed minorities could not avail themselves of the guaranties or present their own cases.

Treaties Were Not Enforced by League of Nations

But the greatest trouble with the enforcement of the minority treaties was that, owing to the marked tendency of the League of Nations to bypass the Permanent Court of International Justice, either by refusing to refer questions to it or by referring them only for advisory opinions, the time came when the provisions that violations of these treaties should constitute international questions to be decided by the Permanent Court of International Justice became a mockery.

A vivid instance is that of the German settlers in Poland. These were people who had bought or leased land before the Armistice in territory that was transferred to Poland. A Polish agrarian law was enacted in 1920 for the purpose of evicting these tenants, many of whom had made full payment but had not received their certificates. The Council of the League failed to refer this matter to the Court and it was delayed on hearings of special committees for two years, during which time the evictions of settlers were constantly taking place. It finally was referred to the Court for an advisory opinion, although under the minority treaty the judgment of the Court had been agreed by Poland to be final and to have the same force and effect as an award. The Court held September 10, 1923, that Poland had violated the treaties. Having delayed the matter until very many of the settlers were evicted, before the judgment of the Court was issued, the Polish government interposed further delays, meanwhile making further expulsions, as Viscount Cecil stated to the Council. The conclusion was that Poland practically completed the evictions of the remaining German settlers in violation of the spirit of the decision of the Court against it. This was effected in spite of a specific treaty giving the Permanent Court jurisdiction, making its judgment final, and signed by Poland.

U. N. Is Beginning To By-Pass International Court

It is important to go back to this old history because, as shown in the South African case, we are beginning to follow the same pattern of bypassing the International Court and of treating the question of human rights as a political question instead of a juridical question. Because the matter of the German settlers was

treated politically by the Council of the League, the provisions of the Minority Treaty were nullified. It is important not to nullify actual legal obligations under the United Nations by a similar process.

In World War II individual rights were violated to an unprecedented degree. At Auschwitz, Buchenwald and in the slave-labor camps established by Germany, and still existing in large areas in the world, every human right was violated on such a scale and with such ruthless cruelty that an irresistible demand arose to have a world recognition of human rights. The dislocation of populations agreed at Teheran and Yalta, just as after World War I; made it evident that vast minority problems would at once arise. And so this time, not in individual treaties, but in the Charter itself, declarations were made recognizing the sanctity of human rights. These declarations are of purposes:

ARTICLE 1.

The purposes of the United Nations are:

• • •

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . .

3. To achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

ARTICLE 13.

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

• • •

b. promoting international cooperation . . . and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

ARTICLE 55.

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Other articles of the Charter relating to human rights all express the purpose of the United Nations to protect human rights.

At the same time independence of nations was safeguarded in Article 2, paragraph 7, which reads:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Obviously, if Articles 1 and 13 and similar statements in the Charter establish binding obligations and are effective, Article II, paragraph 7, was bound to come into conflict with the human rights provisions. The maintenance of human rights and freedoms without distinction of race, sex, language or religion necessarily will often involve domestic questions, arising wholly within one nation's territory, out of matters within her domestic jurisdiction.

India-South Africa Case Points Up Question

The case which points up this question and illustrates the difficulty and importance of dealing with human rights on the international level so as to establish juridical international processes, arises out of the resolution passed by the Assembly of the United Nations on December 8, 1946, dealing with the controversy between India and South Africa. The resolution condemned discriminatory laws passed with reference to Asiatic citizens of South Africa. The laws forbid Asiatics to live in certain parts of South Africa, and restrict their right to own or acquire property. The controversy, brought on by the immigration of Indians in large numbers into South Africa, has existed for several decades. The Indians had acquired citizenship in South Africa but, although they were no longer nationals of India, the government of that country had protested in their behalf against discriminations of the kind described. The two governments in 1927 had come to an arrangement called the Capetown Agreement concerning the matter, reaffirmed in 1932, which was repudiated when the present South African government came into power.

South Africa, in the United Nations proceeding of 1946, did not deny the enactment of the discriminatory laws, but urged that the claimed agreement previously entered into was not binding, asserted that the proposed resolution condemning her action constituted an intervention in matters essentially within her domestic jurisdiction, and asked to have the question submitted to the International Court for advisory decision.

In argument on the resolution Mrs. Pandit contended for India that South Africa had admittedly violated the declarations on the fundamental freedoms of the United Nations Charter. The Union of

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South Africa urged that under the Charter, interference with her local laws and the enforcement of them was forbidden.

Dr. Wellington Koo, conceding that legal questions were presented, favored action by the Assembly because the questions involved affected "the honor of a whole continent, the pride of half the human family, the dignity of man himself." But the right of independence is just as basic. It involves the very right to existence of every nation, great and small. It was a mighty victory, so considered, and so, in actual fact, when the Convention of the Pan American Union in 1933 abolished the right of intervention. And not only South and Central America, but nations all over the world rely upon this article as keenly as Asiatics or Negroes on the equal rights declaration.

United States Has Intervened in Latin America

What is intervention? It is interference by one state in the domestic affairs of another state without its consent.

A nation's right to independence has always meant its right to manage its own affairs free from outside domination and interference. A rapid sketch of the struggle to abolish intervention in this hemisphere emphasizes the importance of Article 2, Section 7, of the Charter, upon which South Africa relied.

A clear case of intervention arose between the United States and Colombia in 1903 when Colombia refused to carry out the treaty negotiated with the United States for the Panama Canal rights. When the treaty was rejected by Colombia, great dissatisfaction was felt in Panama, a state of Colombia, and she declared herself an independent republic. Theodore Roosevelt ordered United States marines to Colon and Acapulco to prevent Colombia from quelling the rebellion within her own state. Within some ten days the United States recognized the Republic of Panama and bought the Canal rights from her. When these facts were fully disclosed great opposition to this action was gradually registered in the United States and, as a result, a number of years later we recompensed Colombia. This high-handed action naturally created hostility towards the United States in South and Central America.

It was about this time that Roosevelt issued his famous corollary to the Monroe Doctrine. The effect was that the United States might intervene to compel good behavior and the payment of debts to foreign interests within this hemisphere. This ushered in, in its full flower, the era of Dollar Diplomacy, in which our State Department too often supported the demands of United States business men, operating in South and Central America, for protection against the restrictions imposed upon them in these countries. During this era in 1913 a United States Ambassador in Mexico actually aligned himself with the movement of Diaz and Huerta to overthrow Francesco Madero, the duly-elected president of Mexico, and permitted him to be assassinated. When this was known in the United States, many citizens were horrified, and nowhere is our action in this matter more strongly condemned than by North American publicists. Meanwhile, oil companies from the United States, Holland and England were coming into Mexico and buying up vast interests in the subsoil. In 1917, when a new constitution was written for Mexico, under which restrictive laws concerning ownership of the land and subsoil were imposed upon foreigners, many American and European business interests in effect demanded that Mexico change her laws. Mexico declared that she was willing to arbitrate damages and compensation but not her right to enact legislation with reference to matters within her domestic jurisdiction. Calvin Coolidge declined to arbitrate, but American public opinion forced a change. Citizens of the United States had never desired war with Mexico over the manipulations of wealthy oil-promoters. A change of policy finally resulted, and with the appointment of Dwight Morrow as ambassador, the immediate situation in Mexico gradually eased.

Meanwhile, forcible interventions had been made by the United States in Nicaragua, Haiti and Santo Domingo. As a result, the Havana Conference of the Pan American Union held in 1928 demanded the abolition of intervention. The United States opposed this, and the proposed declaration against intervention was shelved. While President Hoover began a process of reconciliation between the United States and South America with his friendly visit through the Hemisphere, marines of the United States were still kept in Central America. They were not removed from Haiti and Nicaragua until 1934.

Right of Intervention Now Abolished

Only with the express assurance of Secretary Hull at the Pan American Conference of 1933 in Montevideo, coupled with the public statement by President Roosevelt that the United States had abandoned the doctrine of intervention, was the impasse finally resolved. When the United States renounced its reliance on the right of intervention, it was universally acknowledged that it should be abolished. Article 8 of the Declaration on the Rights of States, unanimously passed at Montevideo, provides, "No state shall have the right to intervene in the internal or external affairs of another."

But, in the South African case, as presented to the Assembly of the United Nations, based on the human rights provisions of the Charter, it was urged that a declaration by the Assembly in effect condemning South Africa was not an intervention. Dr. Wellington Koo argued that the resolution proposed was "so simple and mild that really no one could take serious objection to it". He said in effect that the first paragraph simply states that friendly

(Continued on page 788)

Presentation of Libraries

To the Lawyers of France and Italy

■ An unprecedented step in the history of the American Bar Association was taken in July when President Frank E. Holman and Jacob M. Lashly, Chairman of the Special Committee on Aid to Lawyers in the War Devastated Countries, journeyed to France and to Italy to present to the Bars of those nations modern American law libraries. The gifts were made possible through the generosity of the American law book publishers who donated their publications to the American Bar Association for this purpose.[1]

Each library comprises approximately 600 volumes, carefully selected with the view of covering in a practical way every problem of American law that might be expected to arise in those countries. There are included such well known sets as United States Code Annotated, Federal Digest, Supreme Court Reports, American Jurisprudence, American Law Reports Annotated, Corpus Juris Secundum, and American Law Institute Restatement, together with carefully selected dictionaries, textbooks, law directories and tax services.

■ On July 5 a notable company was assembled in the Hall of the Comparative Law Institute at the University of Paris, located at the Sorbonne, when President Holman and Mr. Lashly spoke at the presentation. There were about 300 invited guests, including members of the judiciary, bar organization leaders, members of the Ministry of Justice and of the government, the American Ambassador and specially invited members of the Bar.

Prior to the presentation ceremony the members of the Supreme Court, in robes and wigs, assembled in the Consultation Room of the historic Palais de Justice, on the Ile de la Cité, and expressed in solemn and impressive words a profound sense of appreciation of the overture being made by the American Bar to the members of their profession in France. Excerpts from the speeches made by the distinguished lawyers of the French and American Bars present are given below.

Remarks of Jacob M. Lashly
Chairman of the Special Committee of the American Bar Association

It is a very great pleasure to be here and we appreciate more than words can express the hospitality and welcome of this distinguished gathering.

In the year 1946 the President of the American Bar Association appointed a Special Committee directed to concern itself with the condition and situation of members of the Bar in the war devastated countries of Europe. As Chairman of this Committee[2] I visited Paris, Rome and Berlin in the summer of 1947 in order to carry a message of fraternal greetings to the members of the Bench and Bar of those countries and to confer with the bar leadership as to how American lawyers could best express their sympathetic interest.

Upon my return to the United States we reported to the American Bar Association and our Committee was directed to pursue our overtures of friendship and understanding and to devise some appropriate means of concrete expression to our brethern overseas who had suffered so heavily through the war and the post-war period.

Many of those present know of the courtesy gift packages sent by hundreds of American lawyers to the members of the French Bar whose names were furnished by their leaders. The bonds of friendship and mutual interest were greatly strengthened by these gifts and by the fine spirit of appreciation in which they were accepted. By these means ties have been forged and relationships born which surely will endure through the coming years of awakened international intercourse.

One of the projects which the Committee decided upon was the

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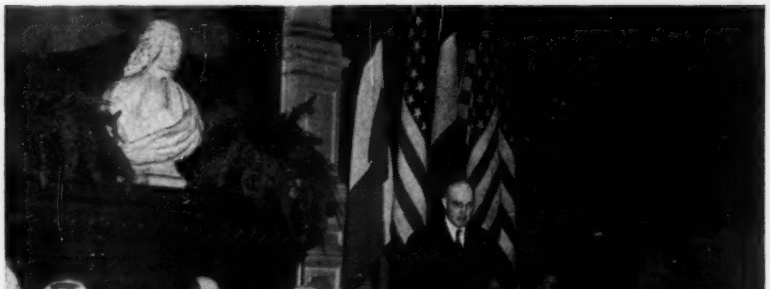
1. A list of contributors will be found on page 757.

2. Other members of the Committee are Willis Smith, of Raleigh, North Carolina; and Carl B. Rix, of Milwaukee, Wisconsin.



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Left to right: President Frank E. Holman; David K. E. Bruce, American Ambassador to France, M. Robert LeCourt, Minister of Justice of the French Republic; Juliot de la Morandière, Dean of the Paris Law School; Jacob M. Lashly; Bâtonnier Ribet, of the Paris Bar, and M. Pierre LePaulle.

establishment of an American law library for the free use of the judges, lawyers, teachers and students of the law in France.

There is an enormously-increased need for French lawyers to know about American law in the changed circumstances brought about by the war. The intermingling of nationals from our country and yours during the war has created new legal problems of great diversity. Americans dying in France; Frenchmen dying in America, leaving heirs or relatives in the other country; members of either nation having marital, inheritance or property rights and interests, or tax questions, make it of more importance than ever before that Frenchmen should have convenient access to an American library sufficiently comprehensive to supply a ready answer to any modern question of American law which might confront a judge, a lawyer or a student in France.

Recognizing these changed and changing conditions the Committee recommended to its parent body that such a library be secured and given by the lawyers of America to their professional brethren of France. In doing so it was the Committee's intention to emphasize the fact that law is the most powerful implement in the armament of a free people. The traditions of France definitely are those of freedom under a rule of law. The Code Napoleon has been in force for over a century and a quarter and still is regarded by lawyers everywhere with respect and veneration.

During the four years of ruthless enemy occupation the French people and the members of the French Bar sustained wounds which will be a long time in healing. It is known to their brethren in other countries that many of the younger lawyers were confined in prison and their clientele dispersed. There is evidence now that they are earnestly engaged in the work of reconstruction and rehabilitation. In one of the letters received by our Committee in acknowledgment of a courtesy gift parcel, there occurred a paragraph which seems to express the sentiment of many:

> We hope [he said] each of us contributing within the limits of his possibilities, to re-establish in our country a stable situation which will bring to everybody the hope of peace and happiness. We are very much touched to find out that our hopes are supported by our friends who, like us, by safeguarding human liberty, desire to insure the maintenance of the civilization to which we remain attached. Please accept my best regards.

From hundreds of expressions such as this our Committee was encouraged to secure the gift library which today we have come to present. The books composing this effective collection were contributed for this purpose by the American law book publishers, whose compliments accompany those of the American lawyers whose present it is to you. You do us great honor in assembling this notable company of officials, judges, leaders of the Bar and other distinguished members of this company who have come to welcome us. The American Bar Association consists of about 50,000 members of the judiciary and the Bar of America, and through its affiliations with state and local associations directly represents approximately 150,000 of the nearly 200,000 members of our profession in the United States. They are the ones who have asked us to extend the hand of fraternal greeting to you and to deliver this concrete expression of their good will.

Remarks of Frank E. Holman
President of the American Bar Association

Our presence here in your great city and your gracious reception to us is not only an evidence of the camaraderie of the legal profession, but also an evidence of the ties of friendship between your country and ours.

I come from the far northwest corner of the United States—by direct air route, more than 6000 miles. May I remind you that in the United States the country west of the Mississippi River is only 100 years old so far as white settlement is concerned. Such cities as San Francisco and Los Angeles were only outposts of a few white inhabitants 100 years ago and my city of Seattle did not then exist. In fact, when your great traveler and student of government, De Tocqueville, visited the United States in 1831, it had a total

population of about 13,000,000 people; New York City, only 200,000; Philadelphia, about 160,000; Boston, less than 150,000; Chicago did not exist; St. Louis and Kansas City were little more than trading posts on the emigrant trails westward. The whole vast territory beyond the Mississippi was an undeveloped, practically uninhabited stretch of prairies, mountains and wilderness.

France has contributed much to the development of the New World in men and ideas. Your citizens left their imprint from Louisiana to Canada, as evidenced by such place names as New Orleans, Baton Rouge, St. Louis, Vincennes and Detroit.

Your city of Paris was a great city in art, literature and industry long before Columbus even discovered America, and so we from America come to you with both a feeling of newness and a feeling of deference. It is a great privilege and honor to be received here in this ancient center of learning and culture and to have you accept from the American Bar Association and the lawyers of America this gift of American law books. As President of the American Bar Association I bring you greetings from the lawyers of the United States. Whether our legal systems stem from the common law or from the Roman or civil law, we are all practitioners in the achievement of justice. The practice of the law is an ancient and an honorable profession, and during the long course of history the members of our profession have always been willing courageously to champion individual freedom and liberty as against the tyranny of arbitrary government of every kind by whatever name such government may be called. No movement in the history of the world for the improvement of man's condition and for the establishment of justice among men has ever succeeded without the presence, the influence and the leadership of great and courageous lawyers. May the legal profession in your country and in mine continue this great tradition of courageous leadership.

Gentlemen, we are glad to be here, we thank you for your very gracious reception, we will carry back to our Bar Association your message of good will and thanks, and we ourselves will personally ever retain many happy memories of this occasion.

Honored Sir, I hereby deliver and invest you, as representative of the French Judiciary and Bar, with this bronze plaque, symbolic of the library and the shelves in which the books shall be housed through the coming years, with the compliments of the American Bar Association and the Judiciary and Bar of the United States, which it represents.

Address of M. Robert LeCourt
Minister of Justice of the French Republic

The authors of the Civil Code had, in their wisdom, already foreseen the frame of the cordial ceremony which we are now attending. Article 894 describes a gift *inter vivos* as follows: "An act by which the donor divests himself at the time and irrevocably of the thing given in favor of the donee, who accepts it". Messrs. Lashly and Holman have just acknowledged this actual and irrevocable divestment, in the name of the American Bar Association. M. LePaulle and Bâtonnier Ribet have just accepted the same, in the name of all of the Bars of France and the French Union, who are receiving today, from our American friends, a priceless collection of six hundred volumes—of which the Dean of the Law Department of the University of Paris has accepted the custody in the name of the Institute of Comparative Law.

But if, from a strictly legal point of view, the operation has now been perfectly carried out, it is not twisting principles too seriously to place this gift on the higher plane of relations between our two countries

U. S. I. S.

Left to right: Rene Cassin, Vice President of the Council of State; President Frank E. Holman; David K. E. Bruce, American Ambassador to France; and M. Robert LeCourt, Minister of Justice of the French Republic.

and to treat it as a gift from the United States to France. The acceptance thereof, in this case, is a governmental prerogative, and the Keeper of the Seals, the Minister of Justice, takes advantage with delight of this broader interpretation to thank you, Gentlemen, and, through you and your Association, the United States of America, for the splendid and generous gift which you are making today to our country.

The lawyer that I continue to be, the Vice President of the Higher Council of the Magistrature that I am, can only be very appreciative of your gesture. Yes, hundreds of American lawyers had the delicate thought of sending those friendship packages (to which Mr. Lashly just referred) to the members of the French Bars, when our country, devastated after four years of occupation by the enemy, was no longer able to support us. Then, after our physical strength had been reconstituted, partly through your aid, our friends and colleagues from over the Atlantic Ocean became preoccupied with our documentation. It is in that spirit that today you are giving us this library "sufficiently comprehensive," Mr. Lashly said, "to supply a ready answer to any modern question of American law which might confront a judge, a lawyer or a student in France".

* * *

Consequently, one must not take too seriously whatever may separate our legal conceptions from your own. But, are they really so different? Is it a fact that the Roman law never crossed the ocean? Have not your jurists for a good many years been studying with predilection the problems raised by the interpretation of the texts of the Digests? This common foundation affirms itself with even more strength today as we all feel the need of giving value to the spirit of justice itself. Mr. Lashly was certainly right when he stated a short while ago that the law is the most powerful instrument in the armament of a free people. The international declaration of the rights of man, in which our two countries took such a large part, materializes this community of thought.

* * *

In order to render justice, one must, on the one hand, have the sense of justice, of intuition too, and this is related to moral ethics—on the other hand, one must know the rules of the law, and this is related to legal science.

This requires a body of lawyers and judges (*magistrature du siège et du ministère public*), both human and strong and whose authority is supported by bar associations with a high moral standing and an experienced competence. All the work of justice rests on the collaboration of the judge who renders the judgments, of the lawyer who prepares the cases, and of the professors who elaborate the doctrine.

But any science, especially that of the law, is dependent upon the documentation, its abundance, and also upon the facility with which it can be referred to.

What a contribution, Gentlemen, the American lawyers are bringing to us today, in enabling us to be posted in such an exact and complete manner on the laws, jurisprudence and doctrine of the lawyers from the other side of the Atlantic!

We will make use of this immediately, in all of the problems of private international law to which we referred a short while ago and which are brought up in our courts every day.

We shall also use this library in the future, not, then, to apply the law to any specific cases, but to enrich our legislative patrimony, to improve and modify our law. Our Code on Nationality of 1945 followed closely your legislation of 1940, and certain of its provisions found their direct source there—notably Article 19. Your very generous gift will make such an interpretation even easier.

* * *

Permit me, Gentlemen, in concluding, to place this ceremony under the sign of those whose memory was evoked a short while ago: the Americans who died in France, the French who died in America. They have been the pioneers of our mutual friendship through the ages, from the épopée of LaFayette and of Rochambeau to that of Eisenhower and of Patton.

But, have they not in this way been the most devoted and the purest servants of the law? It is in their names that I can today express to you the thanks of France.

Address of Bâtonnier Ribet

President Holman was surveying rapidly just now the history of his country during the last century, as if he were piloting one of the latest "reaction" airplanes, and he was good enough to recall that our ancestors, men of old France, had in days of yore brought to the United States of America that independence which the American people celebrated yesterday.

This independence, it is only fair to state, you, in turn gave back to us inasmuch as, with your wonderful armies and your powerful martial equipment, you aided us twice in thirty years to drive out of our land an enemy who wanted to bind us into slavery.

When General Pershing landed in our country in 1917 he exclaimed: "LaFayette, we are here!". Today, in this room of the Law Department of our old University, it is Cujas and Pothier, intimate friends of our Dean of the Law School, who now exclaim: "You have come back with aims of peace".

One says that peace has come back. But, to bring about peace means to insure freedom to all nations, to re-establish balance in diversity and to give up the privilege of force.

This is only a wish as yet; it is not

quite the reality, so far. But at least your presence among us, Mr. President, and the gift which you make to the French Bar of that library will contribute to bring to the world the stability which is incumbent upon works of peace, in enabling us to compare the legal principles of the various nations.

If force, in fact, were still the means of solving problems among peoples, the only thing which would be left us, unfortunately, would be for us to turn to our inner selves, to this "kingdom within" where totalitarian determinations could never reach us.

Swords win victories; intelligence sometimes ensures political supremacy, but Justice alone can bring about moral conquests.

We do not speak the same language: in order to understand each other we need interpreters, but you and we are marked with the same stamps: that of independence and right, and this is what unites us intimately.

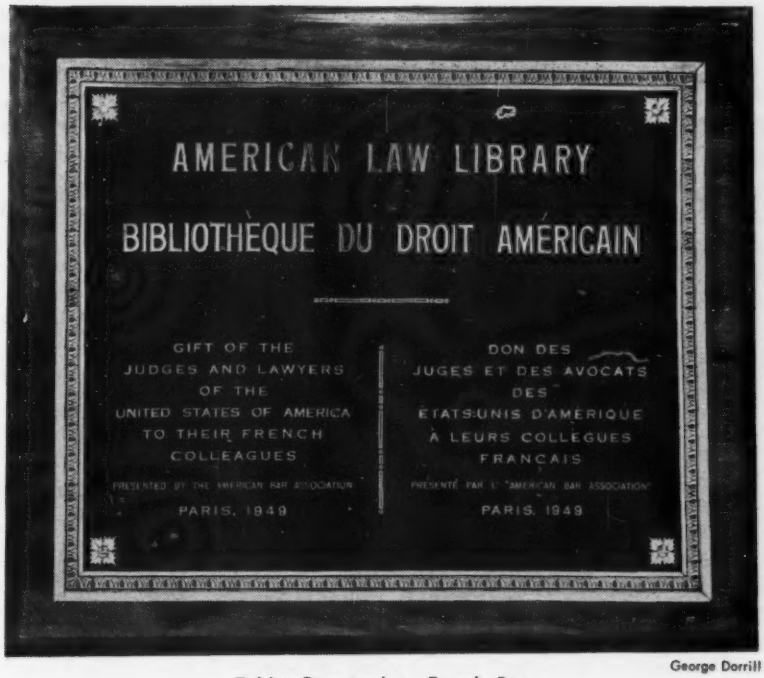
This is why I am pleased you had this thought (among so many others) of making this gift to us, this gift which will enable our young students and us to keep posted on American law, and I am delighted to tell you that no better present could have been made to us.

On your side, I hope you realize the intention which guided us in placing this library here, in the Institute of Comparative Law, where the Dean was good enough to give it hospitality.

These books, in fact, will be used not only by our lawyers and magistrates, who are represented by prominent members in this room, but also by professors and young students who will tomorrow constitute the élite of the nation.

To compare laws means to understand each other better: it means the set-back of the rule of force; it means the preparation and forging of a spiritual alliance, the first resting-place on the road followed by humanity towards happiness.

In the name of the Bar of France I express my thanks and appreciation from the bottom of my heart for this gift of intellectual nourishment (after all you had already done for our colleagues—and you know what I mean) which will aid in tightening even more the close ties which unite our two great democracies.



George Dorrill

Tablet Presented to French Bar

Address of Juliot de la Morandière
Dean of the Paris Law School

This is a happy day for us as this ceremony is a day of Franco-American friendship. You will allow me to tell you all my emotion at seeing this room decorated with French and American flags. As a soldier of the World War of 1914-1918, I fought beside the armies of General Pershing, when for the first time Americans were helping us to defend freedom. After four heavy years of occupation, with Paris, unanimous in that day, showing the immense joy in August, 1944, to acclaim the soldiers of Eisenhower who, after hard fighting in Normandy, were marching down the Champs Elysées with inscrutable faces and the flame of victory in their eyes. I was able to spend several weeks in United States in 1946 and 1947, visiting the Universities of Harvard, Yale and Columbia, seeing your magnificent youth, going forward full of dynamism and eagerness to learn. I have established durable relations with your professors. It was a great pleasure for me to make the acquaintance, in Washington in 1947, of Mr. George Maurice Morris who had been President of the American Bar Association. I have myself seen in all your compatriots a deep desire, not only to help France put herself on her feet again among her ruins, but also to cooperate with her at the spiritual and cultural level. Our legal techniques are perhaps different but our aim is the same: the reconciliation of the social interest with the protection of the social rights of the human person.

You are welcome, Gentlemen. Paris has showed its most beautiful sun to receive you, and this room has regained some youth in mixing

the colors of our two countries. This room is the Council Room of our Faculty. It is the witness of a long legal tradition. It was built by Souffloy in 1780 . . . it has seen the jurists of the monarchy and has heard the teaching of the custom of Paris, of the Roman and canonical law. It has heard the evocation of Cujas, the analysis of the ordinances of D'Aguesseau and, perhaps, the smile of Pothier. It was finally decorated under Napoleon the First and it contains the bust of Tronchet, one of the authors of the Civil Code.

But our law, proud of its traditions, turns itself resolutely towards the future, and we know that America and France must remain hand in hand, working together for the elaboration of the legal status of the future world.

Such elaboration cannot be only the work of legislators and professors.

We all know that the last word remains for practice.

The legal regulations, when they are imposed, may in time force themselves upon the customs of the people. The latter however take inevitably their revenge. Law indeed must discipline public opinion, but must adapt itself to it. That is why we all know the importance of decided cases and the mission fulfilled by practitioners.

Address of Pierre G. LePaulle
Délégué Général pour l'Etranger of the Association of the French Bar

The French Bar Association and the Conference of the Presidents of the Bar of French Provinces have asked me to convey to you the expression of our deep gratitude.

The best way to express our thanks to you is to understand the sentiment which has inspired you and to tell you how we wish to use the gift which you are making to us.

The sentiment which inspired you, we know very well, is inseparable from the love that Americans have for France, which moves us so much when we go to your country, and which we have been heartily returning for a century and a half. However, that love is not a sufficient explanation since you will make the same gesture in other countries in which the reciprocal friendship has been less constant.

What is then that sentiment, which is really national, since you represent 50,000 lawyers who, from all parts of the United States, have answered to your appeal? It is the sentiment of fraternity among all people of good will, it is the desire to understand them, to join with them in building together a peaceful and better world. Be sure that we understand what new element it brings in history by its magnitude and its purity. Be certain that you will find among us not an echo, but a voice ready to answer you.

Your national genius requires immediate realizations which, in themselves, are only starting points towards further achievements.

That is why your generosity, together with the energy and devotion of Mr. Lashly and Mr. Holman, has given birth, in the last two years, to friendships between hundreds of lawyers of our two countries, and these constantly increasing.

That is why you have conceived this library in a manner which makes it a working tool which, kept up to date by your good offices, will allow a constructive collaboration for a long time.

Your achievement deserves indeed our admiration, since you had a difficult problem to solve: you represent fifty-two different private legal units, forty-eight states which have delegated to the Federal Government only a small portion of their sovereignty, the District of Columbia, Alaska, Puerto Rico and Hawaii. Nevertheless, with 600 volumes, you have been able to give on all legal subjects the essential sources of the law and the means to delimit questions and to determine methods.

* * *

This library is not a mere collection of books, it is a complete and harmonious whole, the result of a clear understanding of our difficulties.

These difficulties are substantial indeed. Many French lawyers have not a sufficient knowledge of the English language and, if they have, they cannot grasp the terms and distinctions of a legal system so different from their own.

We were therefore confronted by this problem: how shall we give life to these books?

The answer came through the Institute of Comparative Law which has the staff which we need to operate this library.

Thanks to the substitute, the practitioner will always find someone able to answer his inquiries, to translate, summarize and help to construe the texts which, otherwise, might remain mysterious to him.

* * *

We are ready to make of that library a spiritual center and a home for friendship with the result that the living remembrance of your fraternal gesture will perpetuate itself: it will be the expression, constantly renewed by acts of the immense gratitude of the lawyers of France.

As formal evidence of the appreciation being expressed by the judges of the high Court of France, Mr. Holman and Mr. Lashly were presented with medallions bearing the official seal of the Bar of Paris.

During the ceremony at the Sorbonne, the library was accepted in formal speeches by the Minister of Justice, the Bâtonnier of Paris, the Dean of Law of the University of Paris, and Pierre Lepaulle, an international lawyer of Paris. The tenor of these addresses and the spirit of the gathering was such as to leave little doubt that this gesture of good will by the American Bar was received with deep emotion and great appreciation.

Similar Ceremony Takes Place at Rome

▪ A similar ceremony took place at Rome on July 11. The books were assembled in a beautiful case made for that purpose and installed in a prominent position in the Lawyers' Library in Italy's Palace of Justice, one of the monumental structures in Rome. The ceremony was attended by members of the Supreme Court, Appellate Court and many of the judges of the courts of general jurisdiction, the American Ambassador and invited guests, to the capacity which the space permitted.

Speeches of acceptance were made by the famous statesman, Victor Emanuel Orlando, surviving member of the Big Four negotiators at Versailles, President of the Lawyers Association of Rome, and by the Honorable Andrea Ferrara, First President of the Supreme Court of Italy. These outstanding addresses not only reveal the quality of appreciation and response to the action of our Association, but also reflect the modern trend of the Italian mind, informed in world affairs, and experienced in judicial thought.

Associated Press

Jacob M. Lashly, Victor Emanuel Orlando, President of the Lawyers Association of Rome, President Frank E. Holman; Mr. Justice Ferrara, President of the Supreme Court of Italy.

Remarks of Mr. Lashly

I shall always remember the cordiality of my reception in Rome in 1947. Of course, everybody wants sometime to come to Rome, but the kindness and gracious friendship extended to me by members of the judiciary, the bar leaders, and friends made of my visit something very especial and much more than just a visit to the City of the Seven Hills of antiquity.

I think you would be interested to know that the American Bar Association, which Mr. Holman and I represent, is not an official but an entirely voluntary association of judges and lawyers. In our country judges are drawn from members of the practicing Bar and continue after their elevation to the Bench to be members of the bar associations and to participate in the objectives and work of those organizations.

* * *

This does not mean that American lawyers always agree with each other on public questions. The fact is, lawyers more than others are apt to be independent in thought and action and undeterred by opposition. It does mean that the lawyers of America embrace the fundamental principle of democracy and submit themselves to be represented by the majority where no question of personal loyalties, private conscience or regularity of the proceedings is involved.

Upon one occasion, for example, in the year 1937 a very grave problem of national political policy arose which seemed to the Chief Executive to warrant an enlargement of the personnel of the Supreme Court of the United States. This Court is empowered to declare void statutes which it deems to infringe upon the Federal Constitution. On that ground the Supreme Court had set aside the most ambitious of all the reforms initiated by the Congress and approved by the Chief Executive. Since the Judges of the Supreme Court could not be removed, the idea was conceived to increase its personnel in the expectation that new appointees, younger men imbued with the modern and expanding liberal views of government, would be likely to carry the Court into legalistic channels more acceptable to the policies supported by the Legislative and the Executive Departments.

In that instance the American Bar Association rallied the forces of the organized Bar throughout the country, held and sponsored meetings, conducted referenda, sent out hundreds, perhaps thousands of speakers, pamphlets and periodicals throughout the land. The lawyers thus carried on a campaign of education of such vigor and earnestness that the people were aroused and Congress voted down the proposed changes. It was felt that the dignity of the Supreme Court was upheld and the prestige of our time-honored

institution had been vindicated. The victory of the opposition on this occasion was justly credited to the leadership of the Bar.

* * *

These examples will suffice to indicate in a measure the part which our unofficial bar organization may have in the practical functioning of government in our representative democracy. It is this organization of your professional brethren overseas which has sent us to extend the hand of fraternal greeting to you and to deliver a concrete expression of their good will.

Address of President Holman

This presentation of an American law library by the American Bar Association to the judges and lawyers of Italy is both a symbol and a hope. It is intended as a token of the friendship and admiration of the American lawyers for their Italian brethren, who have contributed and are contributing so much toward the moral and social rehabilitation of their war shattered country. In these trying times of ideological clashes, of conflicting philosophies in which the mirage of promises and the appeal of high sounding phrases and of catching slogans tempt people who have been spiritually and materially weakened by years of personal sacrifices and physical ordeals, the legal profession is entrusted with a great responsibility. Lawyers more than ever before have the duty of upholding the fundamental principles of freedom and human rights without which no system of laws deserves recognition or sanction. From across the ocean we have watched our Italian brethren restore order out of chaos, and tenaciously proceed to reconstruct both on the local and on the national level the democratic institutions that long ago gave Italy her place among the most progressive countries of the world.

This library is not the gift of the United States Government, or of a public agency, but it is the gift of the members of the legal profession of my country, to their Italian brethren. It is a symbol of friendship and solidarity between men who through different instrumentalities and procedures are dedicated to the same fundamental principles and aims: to insure internal peace and to settle human conflicts through orderly and impartial means.

Behind the gift of this library lies also the hope that by providing Italian lawyers with direct sources of information as to the details of the American legal system, they may not only solve specific professional problems, but, through that technical knowledge, become better acquainted with our institutions and our way of thinking. While lack of knowledge easily breeds misconceptions and prejudices, knowledge, particularly if direct and personal, is the source of understanding. By the combined media of these books a closer bond may be established between us. No enduring friendship can be expected unless it is based on mutual understanding as well as on the frank acceptance of our differences in principles, institutions and attitudes.

Your law and our law stem respectively from the Roman and English laws which represent the greatest contributions made by legal minds to civilization. You are familiar with the fact that the American legal system is founded on the adoption of the English common law as it existed at the time of the attainment of American independence. To that body of law are added the statutes of the forty-eight states and of the Federal Government as well as the decisions of the state and federal courts. It is a system which appears baffling and extremely cumbersome to a lawyer trained in the logical and systematic practice of code law, which makes for uniformity and certainty.

* * *

Another fundamental distinction between our two legal systems is that American courts are bound by precedents. The decision of a higher court is binding on the lower courts, and even the Supreme Courts consider themselves constrained in some degree to abide by their previous decisions. This doctrine, known as *"stare decisis"*, is peculiar to the common law and is predicated on the need to ensure the certainty in human relations that is one of the ultimate goals of law. Thus, precedents are overturned only in rare circumstances, to satisfy the need for a certain flexibility in the changing conditions of economic and social environment. Common law consists of law made by the courts in centuries of experience and evolution. It is the product of the judiciary in contrast with the code law, which embodies in a systematic order the laws made by legislative bodies. This contrast is reflected in the interpretation and study of the law, which in America focuses on courts' decisions with limited attention being paid to commentators and treatises. As these books bear witness, court reports are the primary source of our law.

In view perhaps of these striking differences, the Anglo-American common law is often regarded as the antithesis of the legal systems of Italy and other countries which stem from the Roman law, as codified by Justinian. Yet we common law lawyers are fully aware of the great debt that our law owes to the law of imperial and papal Rome.

In presenting this library to the lawyers of Italy, we are conscious of all the contributions made by your people and ancestors to our own body of laws and procedural institutions. Our gift could be described as being in recognition, if not in payment, of a debt. We are taking this course in a constructive and progressive spirit. In the ideological struggles of this century, lawyers who believe in an orderly system of society founded on natural law and the dignity of freedom must and will

stand together as a bulwark against oppression from any source. May this library of American law be an instrument of closer understanding and fraternal association between the lawyers of our great nations, dedicated as they are to the attainment of men's highest ideals of freedom, justice and peace which, above all and any difference in rules and procedures, stand as the ultimate purpose of your and our legal systems.

Honored Sir, I hereby deliver and invest you, as representative of the Italian judiciary and Bar, with this bronze plaque symbolic of the Library and the shelves in which the books shall be housed through the coming years, with the compliments of the American Bar Association and the judiciary and Bar of the United States, which it represents.

Address of Victor Emanuel Orlando
President of Lawyers Association of Rome

As President of the Rome Bar Association, and with the responsibility that that name implies when a jurist speaks to jurists, I am deeply conscious of the great honor of being the voice of the Italian lawyers in expressing to Mr. Holman and Mr. Lashly of the American Bar Association our thanks for the gift of the "Library of American Law."

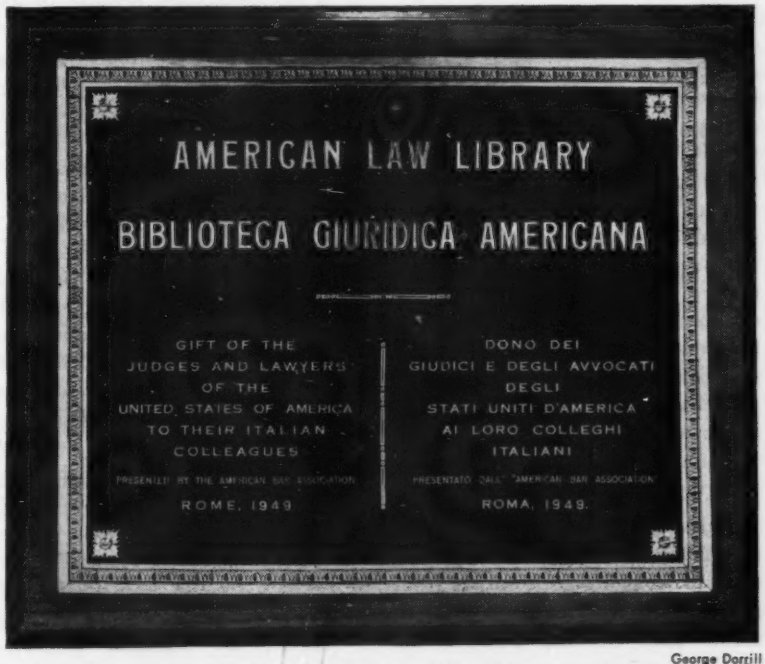
You accompany this wonderful gift with the happy thought that it represents a hope and a symbol. In considering the significance of the symbol, it seems to me that your gift represents a hand offered to friends who have suffered much; this hand meets ours in a sentiment of chivalrous courtesy, mutual fraternity and cordial solidarity. Courtesy, chivalry and fraternity are the characteristics of our profession, and one might say that conflict, which is inseparable from the law and which is reproduced in the professional relations of attorneys, creates that feeling that was characteristic of the ancient knights: loyal conflict as long as duty so commands, but afterwards courtesy and solidarity that draw new nourishment from the accomplishment of duty.

Pride in ourselves is based on a glorious history and it is not vanity to refer to it here. In this sense Mr. Lashly has mentioned certain recent episodes in the history of American lawyers which illustrate the great tradition of freedom and independence of the American legal group. May I recall another incident in our recent history. During a transitory but difficult moment of our past, when all collective and individual liberties in Italy were suppressed, lawyers as a group did not bow their heads but refused to recognize the imposition of any hierarchy, admitting only the one deriving from the free recognition of values and conducting its elections and rendering its decisions free from constraint and injustice. Italian lawyers could only be conquered by eliminating the autonomy of their group and transforming the representatives of the Association into representatives of the government.

So much for the symbolic meaning of your gift.

As for the hope, may I recognize the courage with which Mr. Holman raised a subject which is of the greatest importance in our relations; a serious and complex subject to which I have often given much thought.

Mr. Holman said: "No enduring friendship can be expected unless it is based on mutual understanding as well as on the frank acceptance of our differences in principles, institutions, and attitudes." And going from the effects to the causes, he observed: "The Anglo-American common law is often regarded as the antithesis of the legal systems of Italy and other countries which stem from the Roman law, as codified by Justinian." He mentioned what he considers the main cause, that is, that the Anglo-Saxon law in Europe and in America is founded on *common law*, as well as on the contribution to the law of statutes, in particular those of the forty-eight states, thus



George Dorrill

Tablet Presented to Italian Bar

making it extremely varied.

May I express a different opinion, though I do not wish to deny the consequences of this difference in technique. I do not think this is a sufficient reason for a lack of understanding between Latin or European jurists and those from Anglo-American countries, as Mr. Holman has pointed out.

When one states that a country bases its juridical system on common law, the technical character of this statement means that the country has not adopted the system of codes, but rather follows a law that derives from deep and ancient traditions which are more or less part and parcel of the nature of the people itself. This situation of not having a written law or codes was the condition of German law during most of the nineteenth century because we all know how recent are the German codes. This difference which is almost analogous to the differences which for the time being divide us from the Anglo-Saxon law did not, however, prevent a full scientific cooperation between the German law and the law that Italy laboriously created for itself as she developed into a single nation.

I myself was never a friend of codifications and have complained and continue to complain that in Italy we have had too many codifications. I, therefore, make this wish that if I should have a biographer and this biographer will speak of my activity as Minister of Justice, he should only praise one thing: that I have never made or aspired to make a new code. From an ideological point of view I would be, therefore, much closer to the British and American ideologies; when I study their legal literature, however, I am aware of those difficulties in understanding to which Mr. Holman was referring in his speech.

A pessimist might infer from these remarks that the contrast between the two legal literatures arises from a different juridical feeling in the Latin and German *vis-à-vis* the Anglo-Saxon. I deny that such a statement has a basis. As far as the British are concerned, one might perhaps mention against my theories the pride with which they maintain their splendid isolation also in the legal and institutional field. To this effect the British law might be construed to be a defense, not so much of the rights of men as of the historic privileges of British subjects. This sentiment could be likened to the one of the very first Roman laws *(jus quiritarium)* considered to be a privilege of the *civis romanus*. But one should add immediately that the glory of Rome consisted in rapidly abandoning this mentality so that the *jus civilis* was soon transformed under the influence of the *jus gentium*.

The time and place do not allow me to go into technical details. In summary, my thought is that the fundamental reason for the lack of mutual understanding between our juridical literature should be attributed to the use of a different technique: the term technique being employed in a wide sense so as to include method and system. Let us admit that we, and even more the Germans, are outstanding in dogmatics. The law does not allow us to accept principles because of an authority, divine or human. In no case can we renounce the discussion of the rational foundation of any principle in and of itself, as well as in its coordination from which the particular provision of law derives, which in turn makes up the system. The "cult of the precedent" which is characteristic of the Anglo-Saxons finds its limitation in this aspiration of ours to a methodical and systematic re-examination. Our President Ferrara has stated that in Italy also jurisprudence desires to maintain the uniformity of its decisions, but this principle is never empirical because we admit the variability of cases. Very rarely does the Court of Cassation reverse a sentence, but often it does not apply it because of the lack of precise similarity.

We are too dogmatic and systematic and not empirical enough or ready to admit an actual experience. If we should temper the excessiveness of these tendencies and at the same time the Anglo-Saxon jurists become considerably more dogmatic and less empirical, the two schools would become closer and it would be possible to achieve a collaboration that would bring enormous advantages to jurisprudence and therefore to humanity, since the tremendous crisis which humanity is enduring is above all a crisis of law.

We fulfill an act of pure and elementary justice in recognizing the glory of the two great Anglo-Saxon peoples in the development of public law which can be compared to the development of private law in the framework of Roman law. The British have discovered a fourth form of government which includes the three classes of Aristotle, that form of parliamentary government accepted by most of the civilized people. The Americans have also created a new form of government, the federal government to which form all people today aspire with an intensity which is a hundred times greater after the years of suffering and dangers that humanity has endured. This was achieved by the Anglo-Saxons, even if, curiously enough, their main interpreter of their juridical system, Blackstone, does not give the same importance to the distinction between private and public law as we Italian and European jurists do.

As for myself, I attach so much importance to the collaboration of juridical thought between us that I would propose a sort of Nobel prize to be given to the best study and analysis of the deep-rooted reasons of this conflict, which is one of technique and of method: having found the causes, the remedies should be rapidly and easily discovered.

Mr. Holman and Mr. Lashly, this would be the realization of a great hope and if this meeting in Rome has contributed to it, we should all be proud and well we could apply the Roman motto *"Quod bonum felix faustumque sit"*.

Address of His Excellency Andrea Ferrara
First President of the Supreme Court of Cassation

As judges and lawyers we are, therefore, the recipients of your outstanding gift. As judges and lawyers we are not here linked by an almost legal chain as you are; but I am happy to state that profound sentiments of mutual esteem and consideration unite us in the noble common aim of providing for justice and guaranteeing liberty. And now we can consider ourselves as the united beneficiaries of the magnificent collection of American law of which today you have the kindness to make a solemn delivery.

* * *

Not today, but back in 1869, Francesco de Sanctis, in one of his happy intuitions, thought of comparing the American people to the Roman people. And today, we also can agree with him. Two peoples, equally positive, healthy and strong, who have known how to do great things with physical vigor and with the force of sentiment; not tormented by the malady of confused ideals; aware of their objectives and guided by a clear and well-defined goal; that which a man of action believes he can reach as the crowning consummation of a definite ideal.

In this place of study and concentration there are gathered together today the thoughts and the sentiments of two peoples. Raising their eyes from the volumes or meditating on these works, many judges and lawyers will cross in imagination the space that divides us, and will see other judges and lawyers working on the same plane of the law, which affirms the equality of the rights of men and secures the triumph of justice.

* * *

Tell the judges and lawyers of the United States that on the ancient banks of the Tiber today this monumental expression of your juridic thought and application of the law radiates, beside our juridic works, the light which illuminates the road of the truly civilized peoples; that of the Law, universal and immortal.

American Bar Association Successful

As *Amicus Curiae* in *Bercu* Case

▪ On July 19, 1949, the New York Court of Appeals unanimously affirmed the decision of the court below in the matter of *New York County Lawyers Association* v. *Bernard Bercu, a Certified Public Accountant,* who had been enjoined from giving tax law advice and found in contempt of court.

In view of the intervention in the Court of Appeals as *amicus* of the American Institute of Accountants representing nationally the certified public accountants, the House of Delegates by unanimous vote authorized an intervention by the American Bar Association as *amicus* to be represented by its Committee on Unauthorized Practice of the Law. Leave was granted by the Court and John D. Randall of Cedar Rapids, Iowa, and Thomas J. Boodell of Chicago, Illinois, both members of the Association's Committee on Unauthorized Practice of the Law, filed the brief on behalf of the Association. This brief presented the whole problem of the practice of law by accountants on a national scale, pointing out the public danger if certified public accountants were to be permitted to practice tax law.

The unanimous affirmance by the highest court in the State of New York will undoubtedly have a salutory effect. The opinion which has been affirmed can be found at 273 App. Div. 524; 78 N.Y. Supp. (2d) 209 (April 12, 1948).

As we go to press, word comes to us of the sudden death on August 14 of Philip J. Wickser, of Buffalo, New York, who was nominated for the Presidency of the American Bar Association on February 1. He would have been inducted into office at the Annual Meeting of the Association in St. Louis on September 9. Mr. Wickser is survived by his widow and three children, Robert L., John P. and Mrs. Charles U. Banta.

The Case of *Colorado* v. *Rawlings:* Instructions to the Jury

by S. Tupper Bigelow • Magistrate for the Province of Ontario

■ *The People of the State of Colorado* v. *Rawlings* is a criminal action charging bigamy brought against one Herman John Rawlings. The proceeding is much complicated by two factors: (1) Defendant Rawling's house is located at the intersection of four states, Colorado, New Mexico, Arizona and Utah, and, during his various marital ventures, he has changed his residence from one state to another in accordance with the advice of his lawyers and the promptings of his heart; (2) the decisions of the United States Supreme Court in the two *Williams* cases. Mr. Bigelow, speaking through Judge Peabody who is instructing the jury after three days of a confusing array of evidence, makes a forceful and amusing criticism of our present muddled divorce laws.

■ His Honor Judge Peabody:—

Ladies and gentlemen of the jury, the facts in this case may appear to some, if not all of you, to be somewhat complex and perhaps a little confusing, but if we strip them of the drivel and verbiage we have almost endlessly heard from attorneys on both sides of the case for the last three days, we shall find them essentially very simple.

Herman John Rawlings stands before you charged by the people of the sovereign State of Colorado with the felony of bigamy. The allegedly bigamous marriage was celebrated in New Mexico but, as the attorneys have told you, the courts of Colorado have jurisdiction in a bigamy case no matter where the allegedly bigamous marriage was performed. It is your solemn duty to consider the facts and the law and in due time to return to this court with a verdict of guilty or not guilty.

Under the jury system, and I don't know of a worse, you are the sole judges of the facts, and it would be the sheerest effrontery on my part if I were to try to persuade you to take one or another view of what the facts are. You can see how silly this is when I tell you that I have been trying cases like this for years, with and without juries, I can get at the facts very speedily, I know the law to begin with—that is what I am paid for—and I can smell a perjurer with the ease and rapidity with which you can smell a polecat and at twice the distance. Fortunately, however, in this case, there is little or no dispute about the facts and there is, remarkably, no perjury which I was able to detect; so it seems there is a fair chance of justice being done. It is the law which may give you a little trouble before you are through.

It is my duty to tell you what the law is, and you are bound to accept my interpretation of it, no matter how fanciful, outrageous or fantastic it may seem to you to be. None of you knows any law, except what you may have heard from ill-informed friends or possibly attorneys, whereas I know a great deal, or I should not be here. So in arriving at your verdict, you are to base it on the principles of law I shall enunciate to you.

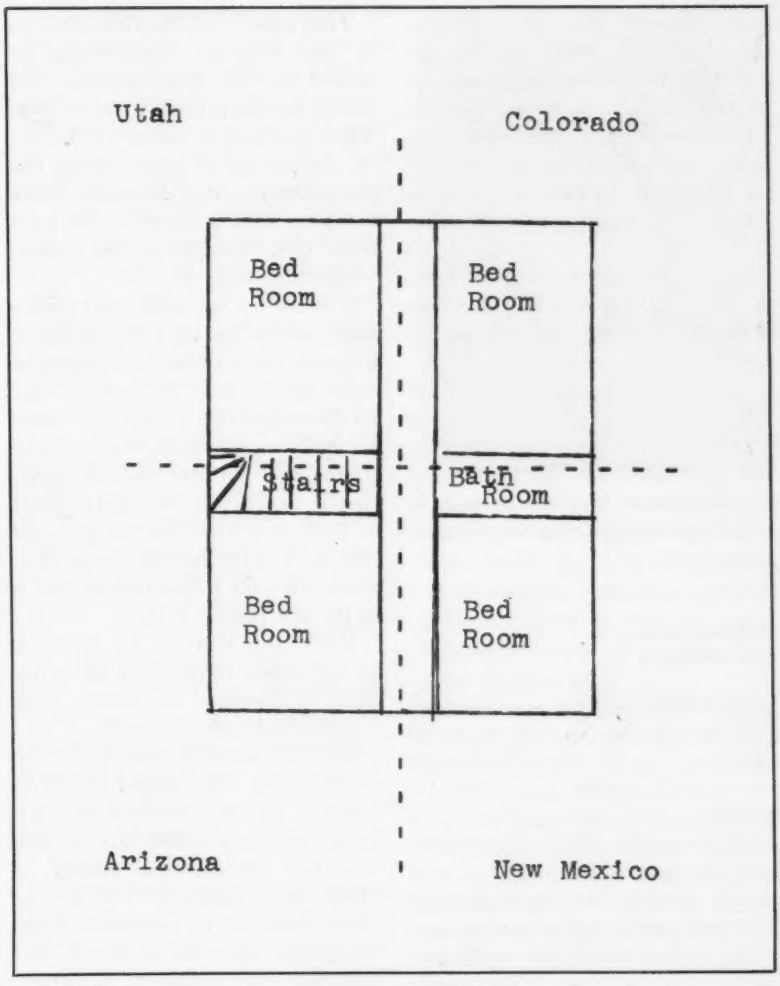
Before I deal with the facts, I should tell you of a law which obtains in every one of the forty-eight states and is very well known. It is this: the only courts which have jurisdiction to try divorce or annulment actions are the courts of the state in which at least one of the parties has his domicile. We all know what residence means; it means the place where you live or reside. Domicile, while it is very difficult to define accurately to suit every set of facts which may exist, means something more. To make things as easy as possible for you, I shall define it for the purposes of this case as residence plus an intention to reside forever at the place of residence.

Learned judges have stated furthermore, and it is certainly the law in Colorado, that if a house is superimposed upon more than one territory, in this case, states, and a person is domiciled in such a house, then the territory or state of his domicile is the one in which his bedroom is, or where he sleeps.

The facts in this case are somewhat unusual. Many years ago, Jebediah Tobias Rawlings, the father of Herman John Rawlings, whom henceforth we shall call the defendant, moved to this part of the country. We have been told that he took great umbrage at the autocratic laws of his native state on the eastern seaboard, the laws of which had operated in such a manner that his rich and fertile farm had been expropriated by the state simply because he had refused to sell it to a railway company at the company's price. Incensed by what he called this autocratic and tyrannical action, the elder Rawlings decided he would no longer bear allegiance to or live in such a state. He consulted a map of the United States and found a point on it, and one point only, where he could build a house partially situate in each of four states, namely, Arizona, Colorado, New Mexico and Utah. Inquiries revealed that the territory around this point of conjunction was, as it is today, composed of various Indian reservations, but after many years' negotiation with the Federal Department of the Interior, he eventually purchased a tract of 640 acres, 160 of which were in each of the states I have mentioned. He then built a house directly on the central point of meeting, on the second floor of which were four bedrooms, each of which, in its entirety, is in a different state. His curious purpose in doing this was to enable him readily to move from one state to another without moving out of his house should the laws of the particular state he might from time to time espouse become distasteful to him.

The defendant was born in the Colorado bedroom of this singular house, and when he was old enough to have a bedroom of his own, it was this room which was assigned to him. Shortly after his twenty-first birthday, his eccentric father passed to his Maker, and in 1941, the accused became the sole owner of this unique dwelling-place.

The marital adventures of the defendant commenced in 1942, when he married Anna Judith Wilkes in Colorado, and it was to the Colorado bedroom that he took his bride. From the beginning, the defendant has told us, the married pair were incompatible and finally he found life with her insupportable.



PEOPLE'S EXHIBIT A

The defendant then consulted a Colorado attorney who advised that incompatibility was not a ground for divorce in Colorado and so far as he could see, the defendant had no other valid ground.

Defendant Obtained Divorce in New Mexico

However, incompatibility is a ground for divorce in New Mexico and when the defendant was advised of this by a New Mexico attorney, he moved, within a few months of his marriage, into the New Mexico bedroom and thus became a resident of our sister-state. He waited patiently for the year New Mexico law requires to elapse and then brought his divorce action in that state, with incompatibility the ground, offering as an instance his wife's stubborn persistence in continually taking him out of business doubles, grounds which, I think you will agree, if you believe incompatibility is a proper ground for divorce, are more than adequate and indeed, on the wife's part, mental cruelty of a particularly reprehensible and sadistic character.

Within a year, the defendant married Bessie May Dunscombe, a New Mexico girl, in New Mexico. After the marriage, the defendant proposed that they move into the Colo-

rado bedroom, but partly because the second Mrs. Rawlings thought this room might have unpleasant reminders for her, (as silly a typically feminine reason as one could imagine) and partly because she had been informed that the Arizona climate was more salubrious than that of the other three states, (as foul a slander on the State of Colorado as I have ever heard) the married couple moved into the Arizona bedroom.

Their joint happiness was short-lived, however, as the bride left her husband shortly after the marriage, the defendant's car, his hired man, one Osterhout, and all the cash in the house disappearing at the same time.

Arizona Divorce Not Available

The defendant then consulted an Arizona attorney to seek a second divorce. This, he was told, was not so easy as he might think from his previous experience. Adultery, a valid ground for divorce in Arizona, could scarcely be inferred by a court simply because Mrs. Rawlings and Osterhout had left at about the same time, even though the neighbors were in no doubt about the matter at all. Mental cruelty was at best, a doubtful ground, since the statutes require extreme cruelty, and it was well known, the attorney said, that some Arizona judges had very inelastic views on the meaning of these words, although my information is to the contrary. Perhaps, however, if there were such judges, they believed that the words meant exactly what they said. Desertion must subsist for one year, and of course, it was always possible that Mrs. Rawlings might return, which would put an immediate end to the desertion. Why not try Utah? the attorney suggested. In Utah, cruelty causing great mental distress is a ground for divorce, and while that means much the same as mental cruelty, the Utah judges, different from their Arizona fellows, took a very tolerant view of the definition of these words.

That seemed to the defendant to be the solution. Accordingly, he moved into the Utah bedroom and waited for the necessary year to pass. Then he brought action for divorce on the ground of great mental distress, alleging that his wife drank her soup with a sound, as we have been told, resembling the words, "slup, slup, slup."

It is not for me, ladies and gentlemen, and far less for you, to criticize the judgments of learned judges in other jurisdictions, so I shall make no observation on a judgment based on such a reason as that beyond stating, as I am sure you will agree, that if that is the law in the State of Utah, it is high time we gave the state back to the Indians or the Mormons, whoever it was who owned it in the first place.

When this divorce was granted, the defendant returned to his native State of Colorado by moving back into the Colorado bedroom.

Within a month or two, he met an Arizona girl who agreed to marry him. As it was arranged between them that they would live in Arizona, she was sagacious enough to think that it might be well to take legal advice on the question of the defendant's marital status in that state, and that appears to have been a prudent action, because her attorney advised the couple that so far as Arizona was concerned, the New Mexico and Utah divorces were not recognized at all and therefore he was regarded as still being married to his first wife and bigamously married to his second.

Another Lawyer Disagrees on Arizona Divorce Law

The situation could be rectified, in Arizona, at least, by procuring Arizona divorces. *He* knew some judges, he said, who granted divorces on the flimsiest grounds; they held the unusual and unorthodox opinion that if both parties to a contract no longer wished to be bound by its provisions, they should be permitted to put an end to it. Of course, it was pointed out, Rawlings would have to move into his Arizona bedroom and wait for the required year to elapse before he could commence his actions.

This seems to be altogether different advice from what Rawlings' own Arizona attorney had told him when he was seeking his second divorce. But it is not at all remarkable that two attorneys should have given conflicting opinions on the same matter, even on such an elementary matter as this; not only attorneys, but judges disagree, as you shall shortly hear.

The impatient young lovers contemplated such a long delay with horror.

Then why not try annulments? the resourceful attorney suggested. Just as good for all practical purposes, they had the additional advantage that Rawlings would not have to wait a year; he could move into his Arizona bedroom and start proceedings at once. The judges who held liberal views on divorce were just as accommodating in annulment actions.

The attorney further advised the young couple that the grounds for an annulment in Arizona were "an impediment rendering the marriage contract void," which included fraud, provided the fraud actually induced the marriage. The attorney thought it would be safer if arrangements could be made, and he thought he could make them, to have the two annulment cases tried by two different but sympathetic judges.

Could the defendant not recollect, the attorney asked, some false statement made to him by each of his wives before the marriage which induced him to marry her and without its having been made, he would not have married her?

Defendant Recalls Fraud in Two Marriages

Indeed he could. Rawlings readily recalled that his first wife had told him she was a beneficiary in the amount of $100,000 in her late uncle's estate. The defendant frankly admits, and his frankness does him credit, that at the time, he needed $100,000 in the worst way and he married his first wife for the sole

purpose of getting hold of this undeniably attractive sum of money. After the marriage, it developed that his wife had about $5,000 worth of debts but no uncle, alive or dead. Assisted by these facts, later on, the Arizona courts granted the annulment sought.

With respect to the second marriage, the defendant most conveniently recalled that his second wife had told him she was an Aztec princess—whatever that is—and he married her for that reason and that reason only, as, he stated on oath in the Arizona courts, and here, too, for that matter, that he had always wanted to marry an Aztec princess. Of course, it turned out later that she was not even an Aztec, let alone a princess; she was, in fact, a member of the Dutch Reformed Orthodox Evangelical Church, something quite different, I am informed, from the Aztec faith.

The annulment decree was in due course granted. Ladies and gentlemen, the naïve and simple credulity of the judges in Arizona must astonish you as much as it does me. Again, however, we must not criticize their judicial acts beyond wondering, as I am sure you are, how such arrant simpletons ever get themselves elected to the bench.

It was at this point in the defendant's affairs, luckily before he married for a third time, that the second Mrs. Rawlings, who had apparently tired of Osterhout, or Osterhout of her, armed with legal advice from a Colorado attorney, returned to the defendant's home and demanded reinstatement in the New Mexico bedroom as the right due her as his lawful wedded wife. The defendant showed her the Utah divorce decree and the Arizona annulment decree he had procured against her and in coarse but forceful language which I cannot deprecate too strongly, told her to "get the bejeezus out of the joint and stay out".

Defendant Is Arrested for Bigamy

For answer, Mrs. Rawlings returned to Colorado, where she prevailed on the appropriate officials to prosecute the defendant for what she alleges was his bigamous marriage to her. He was arrested on his Colorado property and brought before our courts.

Those are the simple facts. In short, the defendant has married two women, divorced them both and as well, has had both marriages annulled. That sort of thing is happening every day in this broad land. How, you will ask, could a man be less a bigamist when he has had each of his marriages wiped out twice? It must assuredly seem to you, ladies and gentlemen, that the divorces and annulments are legal, valid, eminently proper and correct. A third marriage would not offend in any way the conventions of society, in other ways so often harsh, intolerant, and uncompromising.

Is it illegal, then, you ask? Ah, ladies and gentlemen, that is the question *you* must answer after I have told you of the law, which I shall do at once. Please give me your careful and undivided attention.

For some of our law, we go back to that solemn and honorable document, the Constitution of the United States. Article IV, Section 1, which is widely known as the Full Faith and Credit Clause, states: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

At first glance, for it is written in very simple language, clear to the meanest intelligence,—clear, I am sure, to you, ladies and gentlemen—it would appear that this clause means precisely what it says. But the Supreme Court of the United States, by which you are bound, as well as I, does not seem to think so.

Two celebrated cases touching on our problem today have been decided by that august tribunal, *Williams* v. *North Carolina*[1], and *Williams* v. *North Carolina*[2]. It is the same Williams in both cases and parenthetically, I must say, one must admire his dogged determination, and lawyers everywhere must envy his attorneys a client who takes all his cases to the highest tribunal in the land, win or lose. The second case made it abundantly clear, if it was not clear before, that the Full Faith and Credit Clause will not operate in divorce (and hence annulment) actions unless the decrees are granted in the courts of the state in which at least one of the litigants is domiciled. It is no use, the learned justices point out, in scholarly if recondite language, leaving the state of your domicile to get a divorce in Nevada, and going back home again. Obviously, they point out, you never intended to live in Nevada forever, and if you said you did, you were simply not telling the truth; you went there for the sole purpose of getting a divorce, and went straight home again. Of course, such a divorce was valid in Nevada, but nowhere else.

S. Tupper Bigelow is a magistrate for the Province of Ontario. Called to the Saskatchewan Bar in 1924, he has practiced in three provinces and was appointed a King's Counsel in 1948. He became Magistrate in 1945 after service in the Royal Canadian Air Force.

The Supreme Court Justices' devious processes of reasoning I confess I have never been able fully to apprehend or, for that matter, agree with, and there join with me in my disagreement, in the second case, at all events, three learned justices who

(Continued on page 789)

1. 317 U. S. 287.
2. 325 U. S. 226.

Compulsory Federal Health Insurance:

An Analysis

by J. W. Holloway, Jr. • of the Virginia Bar

■ Mr. Holloway, Director of the Bureau of Legal Medicine and Legislation of the American Medical Association, outlines the provisions of the proposed federal health insurance program which has stirred up such a storm of controversy throughout the country. Only one title of the legislation urged by the President provides for the compulsory health insurance program, the other six titles concerning themselves with federal funds for medical education, medical research, increasing hospital facilities, expedition of location of doctors, hospitals and other medical facilities in areas short of such necessities, improving state public health services, and making additional grants to the states for maternal care and child health services.

■ In a special message to the Congress on November 19, 1945, and in a number of messages since that date, the latest one dated April 22 of this year, President Truman has urged the enactment of federal legislation providing a nation-wide system of health insurance. Bills that have been introduced since the 1945 message have contemplated compulsory payroll taxes to finance a part of the proposed system, but it has been admitted that appropriations from the general funds of the Treasury would inevitably be necessary to supplement the special taxes.

Among the criticisms that have been made of earlier bills was one directed to the fact that the proposed system could not deliver the services promised because of the inadequacy of hospital and diagnostic facilities and the lack of sufficient professional and technical personnel. President Truman in his April message reflected an awareness of the validity of this particular criticism by recommending, in addition to the specific creation of a system of federal health insurance (1) financial assistance to professional schools in order to increase their output of physicians, dentists, nurses and other professional medical personnel; (2) increased aid to the construction of hospitals and other medical facilities in communities where they are needed; (3) increased federal aid to the states to improve public health services in general and, in particular, maternal and child health services and services for crippled children; and (4) an expanded program for federal participation in medical research.

The President characterized his recommendations as "interrelated parts of a comprehensive plan for improving the quality of medical care and making such care more completely available to our people".

Three days after President Truman's April message was sent to the Congress, identical bills[1] were introduced in the Senate and in the House of Representatives to implement the recommendations contained in that message. The Administration bill contains 163 pages and the text is divided into seven titles, each dealing with a particular part of the comprehensive program recommended by President Truman.

First Six Titles Are Related to Compulsory Insurance

The first six titles of the bill do not relate specifically to a system of compulsory sickness insurance but are, as the President has stated, interrelated parts of that system.

Title I proposes federal aid for education in the medical, dental, dental hygiene, public health, nursing, sanitary engineering, hospital administration and related professions. The types of financial aid proposed in this Title would consist of grants to the schools to help them meet the cost of providing instruc-

1. S.1679, introduced by Senator Thomas, Utah, for himself and Senators Murray of Montana, Wagner of New York, Pepper of Florida, Chavez of New Mexico, Taylor of Idaho, McGrath of Rhode Island and Humphrey of Minnesota, was referred to the Senate Committee on Labor and Public Welfare, of which Senator Thomas is Chairman; H.R. 4312 and H.R. 4313, introduced respectively by Congressman Dingell of Michigan and Congressman Biemiller of Wisconsin, were referred to the House Committee on Interstate and Foreign Commerce.

tion to students, similar grants to enable the schools to defray the cost of additional construction and to secure additional teaching personnel, and federal grants to provide for scholarships so as to increase the number of persons entering such schools.

Title II would allow additional federal funds for medical research in particular relation to the cause, prevention and methods of diagnosis and treatment of poliomyelitis, diabetes, arthritis and rheumatism, multiple sclerosis, cerebral palsy, epilepsy and other diseases or groups of diseases. This Title authorizes assistance to be given to research conducted by public and private agencies and would create a national advisory council in relation to each of the diseases on which research would be instituted.

Title III provides for a broadening of the provisions of the Federal Hospital Survey and Construction Act by (1) extending its duration beyond the five-year period provided in the original act, and (2) increasing the amount of federal funds available for the construction of additional hospital facilities and the construction of diagnostic clinics, with a new authorization for aid in providing facilities for group medical and dental practice.

Title IV would extend grants and loans to expedite the location of physicians, dentists, hospitals, clinics and other requisites for medical service in areas that are short such personnel and facilities, with a special provision for assistance to farmers' cooperatives in selected rural areas to initiate and carry out experimental plans for providing comprehensive medical care for their members.

Title V provides for assistance to the states in developing, expanding and improving (a) basic state and local public health organizations and the basic services provided thereby, (b) health services to the extent not otherwise made available under the provisions of Title VII, for the prevention, treatment and control of disease, including mental illness, tuberculosis, venereal disease, cancer, heart disease, other chronic diseases, disorders associated with aging, dental disorders, nutritional deficiency diseases, occupational and other diseases that constitute special health problems, and (c) the training of personnel for state and local health work.

The next Title, Title VI, would make available federal funds for the investigation of all matters relating to the welfare of children and additional funds for grants to states for maternal, child health and crippled children's services.

Title VII Would Set Up Compulsory Health Program

The concluding title of the bill, Title VII, outlines the most controversial part of President Truman's health program. It promises to deliver adequate medical, surgical, dental and hospital care to an estimated 85 per cent of the population, including self-employed persons such as lawyers, physicians and dentists. This Title is obviously based on the assumption that 85 per cent of the population is not now getting adequate care and that it is necessary for the Federal Government to provide a nation-wide system supported by compulsory taxes to accomplish an objective that cannot be accomplished in any other manner, or so it is implied.

Fiscal Provisions—To finance the compulsory health insurance program, the bill would create on the books of the Treasury of the United States a separate account to be known as the "Personal Health Services Account". While the statement has frequently been made that the funds to be placed in this account will come, in the main, from a 3 per cent payroll tax split between employers and employees in covered occupations, on wages up to and including $4,800 a year, there is no such specific provision in the bill. Nor is there any definite statement concerning a tax to be imposed on the self-employed. Title VII, on the other hand, provides that there will be appropriated to the account for the fiscal year ending June 30, 1952, and for each fiscal year thereafter, sums equal to 3 per cent of all wages estimated to be received during such fiscal year. There will also be appropriated to the account (1) sums equal to the estimated cost of furnishing dental and home nursing services during each such fiscal year and (2) any further sums required to meet the expenditures to carry out Title VII, with a proviso that the aggregate appropriations made pursuant to (1) and (2) for any fiscal year from 1952 to 1954, inclusive, may not exceed ½ per cent and for any fiscal year from 1955 to 1957, inclusive, 1 per cent of the estimated annual average of all wages, as defined in the Title, received during the three fiscal years preceding such fiscal year.

There will be appropriated to the account, too, for the fiscal year 1951, a sum equal to 1 per cent of all wages estimated to be received during such fiscal year, to constitute a reserve fund for special allotments to the states for use in case an emergency arises, such as for example an epidemic or a disaster.

From the general funds in the account, allotments will be made to the states that have submitted approvable plans to the federal administrative agency providing for the supplying of the contemplated health benefits.

Program Would Be Administered by National Board

On the federal level, the provisions of this Title will be administered by a National Health Insurance Board to be created in the Federal Security Agency which will function under the direction and control of the Administrator of that Agency. There will be a National Advisory Medical Policy Council appointed by the Administrator which will have lay and professional representation.

A state plan, to be approved, must provide for a single state administrative agency and a state advisory committee, which must include members familiar with personal health needs in urban and rural health

areas and a majority of members of this committee must be representative of the interests of persons eligible for benefits. Other members must be chosen from the several professions, hospitals and other organizations in the state that will furnish benefits. A state plan must also divide the state into local health areas and for each such area there will be a local administrative committee or administrative officer and, in addition, a local advisory committee. Title VII contemplates that the administration of the program will be decentralized to these local health areas.

If prior to July 1, 1950, a state has not an approved plan in operation, the National Health Insurance Board will, beginning July 1, 1951, itself administer the program in that state.

Bill Spells Out Details of Eligibility

A potential beneficiary must qualify for services by meeting certain requirements spelled out in detail in the bill. He must, for example, have received a specified amount as compensation during a given period preceding the beginning of the benefit year. Noninsured persons, such as those who are in the indigent class and who may be entitled to be furnished medical care by either the state or by one of its political subdivisions, may become entitled to the benefits promised by the bill if equitable reimbursements are made on their behalf to the federal account by public agencies of the United States, the several states or their political subdivisions.

Physicians, dentists, nurses, hospitals and others may qualify to render services to beneficiaries if they wish to do so. Physicians and dentists and others who decide not to participate in this program will be forced to limit their practice to the 15 per cent of the noncovered population or possibly to covered individuals who are willing privately to contract and pay for the services they need.

Specialist services may be rendered only by those who qualify under the standards to be established by the federal board. In other words, that board will determine who is or is not a specialist.

The state agency may make agreements with any organized group of individuals, any partnership, any association or consumer cooperative, any hospital or any hospital and its staff, or any organization operating a voluntary health-service plan to provide the services to be made available by this Title.

Beneficiary Will Choose Physician or Dentist

An eligible beneficiary is promised the right to select the physician, dentist, nurse, medical group or hospital of his choice, provided the selectee has agreed to participate in the program and consents to furnish services to the beneficiary. This promise is subject to a further limitation. Maximum limits on the number of eligible individuals for whom any person may undertake to render services may be fixed by the local administration committee or officer on the basis of a recommendation of the professional committee in that area that such limitation is necessary.

Payments for medical or dental services may be (1) on the basis of fees for services rendered, according to a fee schedule; (2) on a per capita basis, depending on the number of persons eligible for benefits who are on the practitioner's list; (3) on a salary basis, whole time or part time, or (4) on such combinations or modifications of the foregoing as may be approved by the state agency. The amount of compensation to be paid for services rendered will apparently be determined by the state agency, but the method of compensation in each health service area will be determined by the majority of medical or dental practitioners, as the case may be, in that area.

The bill does provide that fees will be adapted to take into account relevant regional, state or local conditions and practices. In determining the amount of such fees, the bill provides, consideration must be given to the annual income or its equivalent that the payments will provide and to the degree of specialization, and to the skill, experience and responsibility involved in rendering such services. The fees paid, the bill further provides, must be adequate to induce practitioners to advance in their profession, to practice in localities where their services are most needed, to encourage high standards in the quality of services furnished, and to give assistance in their use of opportunities for post-graduate study and to allow for adequate vacation.

J. W. Holloway, Jr., is Director of the American Medical Association's Bureau of Legal Medicine and Legislation. A native of Virginia, he was educated at Randolph-Macon College and received his law degree at the University of Virginia. Admitted to the Virginia Bar in 1915, he has been with the American Medical Association since 1925. He belongs to the New York and Virginia Bar Associations, and has been a member of the American Bar Association since 1948.

Sponsors State Object of Health Bill

In a statement issued on the day the Administration bill was presented to the Congress, its sponsors asserted that the bill had two major objectives: "To assure enough medical services to meet the country's needs, and to provide a means for making them available to everyone." The

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New York and National Health Insurance:

Foundations of a Welfare State?

by William Logan Martin • of the Alabama Bar (Birmingham)

■ Mr. Martin compares the newly-enacted New York Disability Benefits Act with the proposed National Health Insurance Act. He finds that they have many provisions in common, but points out one essential difference: the New York act is clearly within the power of the legislature, whereas the constitutionality of the proposed federal act is dubious. From this observation, he goes on to cite other examples of federal policy that may be leading us to a welfare state that would mean the undermining of all our traditional concepts of government. He urges that lawyers, as leaders in their communities, have a duty to use their power of persuasion to prevent this before it is too late.

■ The legislature of New York in April, 1949, enacted a disability benefits law, its purpose being to bring to working men and women in that state a class of social insurance against the hazards of sickness and disability not incurred in their employment.

Senate 1679, introduced by Senators Thomas, Murray, Wagner, Pepper, Chavez, Taylor, McGrath and Humphrey, and on the House side publicly endorsed by Congressmen Dingell of Michigan and Marcantonio of New York, is a 163-page document entitled "The National Health Insurance and Public Health Act" now pending in the Senate of the United States. The difference between the New York law and S. 1679 is that New York state has constitutional authority to enact the law while Congress lacks constitutional authority to enact S. 1679.

The New York law is the fifth of its kind in this country.[1] It does not undertake to impair or outlaw Blue Cross and other health plans, although it inevitably competes with them. It accepts the existing relationship of doctor, hospital and patient. It provides a minimum of government interjection in the field of social insurance. It creates no new bureau, being administered by the existing Workmen's Compensation Board. It applies to employers of four or more on each of at least thirty days in any year. It goes into effect on January 1, 1950. Each employee in employment for four or more consecutive weeks continues eligible for benefits for a period of four weeks after the termination of his employment, but not beyond the first day on which he performs any work for profit.

Benefits become payable after June 30, 1950, beginning with the eighth consecutive day of disability. The weekly benefit is one-half the employee's average weekly wage, but not less than $10.00 or more than $26.00. He is limited to benefits for thirteen weeks during a period of fifty-two consecutive calendar weeks, or during any one period of disability. He must be under the care of a physician, but this requirement may be waived by the Chairman of the Workmen's Compensation Board. No benefits are payable for disability resulting from a willful intention to bring about an injury to or sickness of himself or another, or sustained in the perpetration by the employee of an illegal act; or for disability due to any act of war, or for other exceptions not necessary to be noted.

Beneficiaries Not Entitled to Two Payments

Duplication of benefits is avoided. No benefits are payable if the employee is entitled to a like amount from old age benefits,[2] or under a pension practice of an employer who has contributed to such pension plan and also provided the disability benefits; or from an annuity payable under any governmental system, except under a veterans' permanent disability program, or under any permanent disability program of an employer for whom he has performed services, or through an unemployment insurance, workmen's

1. Other states having similar laws are California, New Jersey, Rhode Island and Washington.
2. 42 U.S.C.A. §§ 401 *et seq.*

compensation or other source in somewhat the same category; each alternative to equal the sickness benefits in amount.

An employee who suffers a disability while drawing unemployment compensation is entitled to receive disability benefits for the remainder of the twenty-six week period. One who is employed by more than one employer and becomes unemployed, but whose employments were not of sufficient length of time to entitle him to unemployment compensation, and who continues attached to the labor market, is eligible for disability benefits for a twenty-six week period.

Benefits beginning with the day of disability are payable direct to the employee after the fourteenth day.

Mechanics of Tax Described

Beginning January 1, 1950, the employee contributes by payroll deductions to the extent of one-half of one per cent of his wages, but not in excess of thirty cents a week, and the employer is required to contribute an additional amount sufficient to cover the cost of benefits. The employer may insure the payment of such funds in a state fund, or in an authorized stock or mutual corporation, sometimes referred to as a "carrier", or file a satisfactory proof of financial ability to pay benefits and deposit sufficient securities, or file a surety bond in an amount not less than one-half the contributions (a) that would have been paid by the employees for the preceding year or (b) one-half such estimated amount for the ensuing year, whichever is greater.

An important part of the plan is the special fund for disability benefits. It is estimated to be twelve million dollars. For the accumulation of this fund a contribution is made of two-tenths of one per cent of wages paid for six months beginning January 1, 1950, not in excess of twelve cents per week per employee, of which the employer and employee each contribute one-tenth of one per cent.

Promptly after April 1, 1951, and thereafter annually, upon appropriate ascertainment, if the fund is one million dollars below either (a) the sum of twelve million dollars or (b) twice the sum of benefits paid during the preceding fiscal year, whichever is greater, an amount is assessed and collected sufficient to restore the fund to twelve million dollars or twice the benefits paid the preceding year, whichever is greater.

Whenever the net assets are less than three million dollars and the disability claims shall indicate the necessity of supplementing the assets of the fund before the next annual assessment can be made, an assessment may be made sufficient to restore the fund to twelve million dollars or twice the benefits paid, whichever is greater. An itemized statement of the condition of the fund shall be open for inspection.

The superintendent of insurance is authorized to examine the condition of the fund at any time on his own initiative or upon the request of the Chairman of the Workmen's Compensation Board. The commissioner of finance and taxation is custodian of the fund and in charge of its disbursement.

Employee To Be Examined Regularly by Doctor

An employee claiming benefits is required to submit himself for examination at intervals by a physician designated by the employer or the carrier, and also at the discretion of the Chairman in respect of contested claims and as the Chairman of the Board may require. Refusal of a claimant to submit to examination disqualifies him from all unpaid benefits.

The name of any physician authorized to render medical care who submits a statement of disability that is not truthful or complete may be removed from the physicians' list.

Any person who for the purpose of obtaining any benefit or payment or for the purpose of influencing any determination regarding any payment, makes a false statement with regard to a material fact, is denied the benefits claimed and barred from benefits for a period of twelve months. Appropriate penalties are provided for failure of the employer to comply with the law.

Insurance policies providing for the payment of benefits shall authorize the Chairman to enforce the liability of the insurance carrier for the benefit of the person entitled to benefits under the policy; shall provide that notice to the employer shall be notice to the carrier; and that bankruptcy of the employer shall not relieve the carrier. Subrogation for a disabled employee is provided.

Each year as soon after April 1 as is practicable, the Chairman and the Department of Audit and Control shall ascertain the total amount of expenses, including cost of personnel and other listed expenses incurred during the preceding year in the administration of the law, which shall be included in the amount to be assessed. An itemized statement of the expenses shall be open to public inspection for thirty days before an assessment is made. An assessment is made against each employer based on the proportion of his annual payroll for such year to the total payroll, limited to $3,000 per annum to any individual.

Any employee may be exempted who files a statement to the effect that he adheres to the faith or teachings of any church, sect or denomination, and who in the practice of religion in accordance with its creed, tenets or principles depends for healing upon prayer or spiritual means.

The special fund of twelve million dollars is the sole source for the payment of benefits and the state undertakes the administration of the fund without any liability on its part beyond the amount of money actually collected and credited to the fund.

The law is well drawn and can be enforced efficiently.

New York Law Is Constitutional, Federal Bill Is Not

We may assume that the New York disability benefits law is within the framework of the constitution of that state. Here is the only laboratory

under our system of government in which such voyages in statism may be begun. If the people of New York wish to require employees to contribute to a fund and augment it by a like contribution from the employer for the benefit of the health of the employee that is New York's business. Any other state may do the same unless prohibited by its organic law. When our limited federal-state system was undertaken in 1776 each state or colony was a sovereign people with all the powers of government. After the effective date of the Constitution in 1789, state legislatures had the power to enact any law not forbidden by the local constitution or delegated to Congress.

It is well for us to remind ourselves from time to time of this status of government.

The New York plan is voluntary, as distinguished from the compulsory method imposed on the states in the unemployment compensation undertaking engaged in by Congress in 1935.[3] There a tax of three-tenths of one per cent was imposed on employers of eight or more, for administration of the plan, and an additional tax of 2.7 per cent was required to be paid into a so-called trust fund for the future benefit of employees in those states that adopted the plan. In those states that were recalcitrant employers could pay the 2.7 per cent into the federal treasury notwithstanding, for the use of the general Government or for employees in the other states. The Supreme Court said this was not coercion, four justices dissenting. What state stands at the Bar of this Court complaining, the majority asked?[4] In that era states did not complain. They accepted from kindly and beneficent federal officials a return of as large a percentage of their own people's taxes as they could trade for.

So, on the theory that there was no prohibition in the Constitution against the taxation of payrolls by the general Government, the scheme was held valid by the Supreme Court.[5]

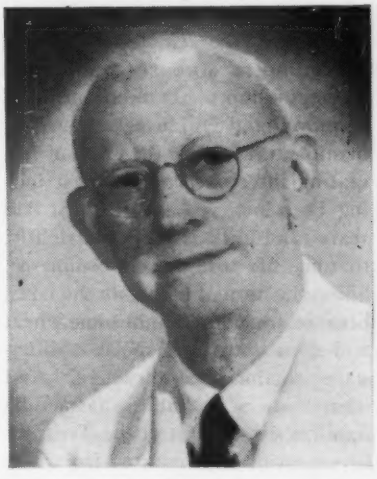
A distinguishing difference between the New York and the federal plan is that the state plan is a pay-as-you-go system. In New York there is no vast fund created to tempt the spender to use it for general purposes and leave an interest-bearing deficit for another generation of office holders to replace by a duplicate tax on the employer, employee and on all others, if that stringent measure should then be invoked. As pointed out in the reports of the Committee on Employment and Social Security, 86 and 83 per cent of the vast fund of eight and twenty billion dollars for the years 1947 and 1948 respectively[6] have been taken out of the old age, railroad retirement and unemployment compensation funds in exchange for the interest-bearing IOU's of the United States to the Secretary of the Treasury. This maneuver with the trust fund in which millions have a share is entirely legal; for Congress so provided in the era when Congress first began openly to seize the powers of the states by silencing the state governments with a partial return in grants and loans of exactions from their citizens, a considerable part of which today helps to swell our staggering public debt.

The principal actors of that era have departed, but they left the debt behind them. Those remaining still bear up under it, for how much longer only time can tell.

Bill Is Another Step Toward Welfare State

The federal social security system was erected under the taxing power buttressed by the lack of the right of any citizen to challenge the legality of the spending scheme.[7] This is an example of government by indirection which for the past sixteen years has effectively federalized a large part of our dual system and laid the foundation of a hand-out state, all at the cost of the powers of state governments and the gradual impairment of the system of individual enterprise; for it has become wellnigh fruitless for any man to exert himself undertaking to amass a competency. Why shoulder all the problems of business with its hundreds of different taxes? As we approach the welfare-state why not get on a government payroll and live an easy life?

We may look at many other jour-



William Logan Martin practices law in Birmingham, Alabama. He received his B. S. at the United States Military Academy, and his LL. B. at the University of Alabama. Admitted to the Alabama Bar in 1908, he served as attorney general of the state from 1915 to 1919, and as judge of the Fifteenth (Alabama) Judicial Circuit. Since then he has practiced in Birmingham. He has been a member of the Association since 1914 and at present is Alabama's State Delegate in the House of Delegates.

3. 42 U.S.C.A. §§ 1101 *et seq.*

4. ". . . We have a club here; we won't give them the administration fund, and they won't be able to administer the law at all unless they dig down into their own pockets and pay the administration costs. . . ." Dr. E. E. Witte, Director of President Roosevelt's Committee on Economic Security, which sponsored the Social Security Act, in hearings before the Committee on Ways and Means of the House of Representatives, page 154, 74th Congress, First Session." ". . . Even now she [the state] does not offer a suggestion that in passing the unemployment law she was affected by duress. . . ." *Steward Machine Co. v. Davis, Collector*, 301 U.S. 548, 589 (1936).

5. *Steward Machine Co. v. Davis, supra.*

6. 73 A. B. A. Rep. 381; 35 A.B.A.J. 254; Daily Statement of the United States Treasury, November 15, 1948, pages 12-15.

7. *Massachusetts v. Mellon*, 262 U.S. 447, 486-8 (1923). *Steward Machine Co. v. Davis, supra.*

neys the Federal Government is making beyond the remotest fancies of the founders of our Government: the regulation of the relationship of employer and employee engaged in manufacture, under the guise of regulating interstate commerce, it having been believed for the first 145 years (and until 1936),[8] and rightly, that manufacture was not commerce; filling the horn of plenty on the farm, because, forsooth, do not some wheat and corn and cattle move in interstate commerce somewhere? And what matters it that the farmer be paid his subsidy out of the Treasury by means of taxes exacted from him and the rest of us?

Let us continue the journeys: Development of the streams for navigation from which presto! there come into being billions of little kilowatt hours owned by guess who? This property the Federal Government, under the Constitution, has the power to dispose of,[9] which it does generally at a loss, thus providing the opportunity to show up private industry for its unpatriotic conduct in making a profit (if it can), after paying taxes to finance the competing venture. Private industry will not act; so the Government must, is the battle cry. If private industry cannot or "will not" raise the capital with which to continue its venture into commercial fields, because equity money is now greatly lessened after taxes and is easily frightened by the threat of Big Government going into the steel, electric, housing and other businesses,[10] our Rich Uncle in Washington must act and with our money. And the persistent proposal to socialize the field of medicine under the guise of the taxing power supported almost entirely by federal employees and organizations with a like viewpoint with respect to taxing, spending and electing, using millions of dollars of public money in an effort to secure for all time this colossal system of power over the lives of all our people[11]—what a system would then be imposed on us! Even now the fear is expressed under the English system that the difficulty of securing the services of doctors in the future will grow greater; for with the end of the incentive on the part of young men to engage in the private practice of medicine, with all the responsibility and opportunity which have heretofore been found in that field, it is feared that only those will follow that path in the future who have a civil service mentality and look to a government payroll as a sufficient staff of support.[12] Once this system with its communistic origin, its state-medicine package including wigs, teeth and corsets, at practically unlimited cost, its 750,000 employees, its pyramid of administrative officials headed up by the Federal Security Administrator as Uncle Sam, M.D.—once this system is fastened on our people, the end of free government is in full view.

Our Association Is Opposed

The American Bar Association has spoken on this subject. The system we challenged in 1944 is the same threat we face today. What we then said is true today.[13] It is not the type of control intended for a free people.

Upon the adoption of this system we become a full-fledged welfare-state through the seizure of unconstitutional powers by Congress.

What a period of government by indirection, of legislation upon pretext, of encroachment upon the powers of the states we have seen unfolded during the past sixteen years! And now, the greatest challenge of all: the threat under the treaty power of the President and the Senate to destroy the "indestructible union of indestructible states" and complete the substitution in their stead of the welfare state, on the theory that the State knows better what the citizen should do than he knows himself.

The President has executed and sent the Genocide Convention to the Senate. Under its terms, the domestic relationships of our people may be removed from the sphere where they have existed for 160 years to settlement by an international court. If the threat were not so grave and serious, it would be well-nigh unbelievable. How could any American to whom important duties have been delegated be willing to bow to the whims of a group of foreign representatives who, except as to England and this country, have never breathed the air of freedom and liberty, and thus jeopardize the powers of our people who fought a revolution to secure these precious rights and established a government of individual liberty which has lasted for a period longer than ever enjoyed by any other people in history?

Covenant on Human Rights Is Another Step

The draft of the Proposed Covenant on Human Rights, not yet in treaty form, strikes even more deeply at our federal-state system, reversing the powers of the states over their most intimate domestic relationships and conferring them on Congress, under the provisions of the Constitution that treaties become the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding".[14] A complete list of the members of the Commission drafting the proposed Covenant is given.[15]

What is the remedy for all this,

8. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937).

9. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 330 (1935).

10. On account of excessive taxation and other causes, money for common stock investments is at least thirty billion dollars less than would otherwise have been available for the decade 1939 to 1947—*Investors League Bulletin* (New York, June, 1949) quoting Congressman Fred L. Crawford of Michigan.

11. Sullivan, *The Case against Socialized Medicine* (1948) 15 *et seq.*

12. Spencer, "How Britain Likes Socialized Medicine," *The Saturday Evening Post* 33 (May 21, 1949).

13. 69 A.B.A. Rep. 493.

14. Constitution, Art. 6, § 2.

15. Mrs. Eleanor Roosevelt, Chairman (United States), Col. William Roy Hodgson (Australia), Charles Dukes (United Kingdom), Fernand Dehousse (Belgium), Alfanasi S. Stepanenko (Byelorussian Soviet Socialist Republic), H. E. Hernan Santa Cruz (Chile), Dr. P. C. Chang (China), Omar Loutfi (Egypt), Professor René Cassin (France), Mrs. Hansa Mehta (India), Abel Ghassem Pourevaly (Iran), Dr. Charles Malik (Lebanon), Ricardo J. Alfaro (Panama), Carlos P. Romulo (Philippine Republic), Michael Klekovkin (Ukranian Soviet Socialist Republic), Alexander E. Bogomolov (Union of Soviet Socialist Republics), Don José A. Mora (Uruguay) and Vladislav Ribnikar (Yugoslavia).

if there be one? We have observed with grave concern the gradual division of the ranks of our people as powerful politicians array employee against employer and class against class and weld racial minorities together in order to continue to achieve victory at the polls. We have seen the Treasury used as a sluice through which to pay hundreds of millions of dollars in subsidies with which to buy the electorate. We have seen the extension of the false and leaky umbrella of social security over millions and millions of our people; the protection of giant monopolies of labor where the top man takes his cue from his government and imposes his taxes on helpless employees in the form of dues which he uses to extend and strengthen his own power; the constantly increasing roll of federal employees whose main interest is to keep their jobs and increase their importance by extending their authority over others and voting for those in power. We shall now observe the spending of billions of dollars of the taxpayers' money to build homes at fantastic figures, with scant hope or expectation that any substantial part will be repaid. We see a never-ending attack on private capital through the imposition of burdensome taxes so that private enterprise may stagger—all these point the way to a socialistic state in which the citizen, once architect of his own welfare and his own fortune, becomes merely a pawn.

Remedy Suggested Is Peaceful Action

"The remedy?", you ask. Fortunately, the remedy still lies in peaceful action. Nearly a century and three-quarters ago our forebears, viewing the long train of abuses that they had suffered and the usurpations evincing "a design to reduce them under absolute despotism", declared it to be their right and their duty to throw off such a government and to provide new guards for their future security. They declared that a government derives its powers from the consent of the governed and that when any form of government becomes destructive of the rights of life, liberty and happiness of a free people the time has come to alter that system of government.

Are the powers now exercised in Washington derived from the consent of the governed? Are they usurpations of power against which the people are helpless? As our forebears declared in 1776, governments should not be changed for light and transient causes, and experience has shown that mankind is more disposed to suffer while evils are sufferable, than to right itself by abolishing the forms to which it is accustomed. But has not the time come again to lay the foundation of government on such principles and organize its powers in such form as shall be most likely to effect our future happiness?

What is our remedy? Our forebears acted. How much less is demanded of us today than of them in 1776! Do we deserve to continue free men? Are we willing to subject ourselves to the abuse that follows public attack on entrenched powers?

From the beginning of civilization lawyers have been in the forefront of the fight for liberty. Can we not now dedicate ourselves to the principle that powers seized by the present Government without the consent of the governed be returned to the people? Our forefathers abolished their unjust government. To do so, they risked life, liberty and all their worldly goods. Is it asking too much for us to demand the cessation of the usurpation of powers by the Federal Government and the end of government by indirection, purchase, pretext and unconstitutionality? Has not the time come for us to speak out for a return of the rights that appear to be lost and for a resumption by the states of those powers usurped from our local governments?

Those who love liberty had better be sharpening their wits.

What a challenge to the organized Bar to lead the way to a rebirth of constitutional government!

Laws of the Town of San Fransisco, 1847

THE JOURNAL HAS RECEIVED a copy of a small volume entitled *The Laws of the Town of San Francisco—1847*. Two hundred and fifty copies of this beautifully bound edition were printed for the members of the Roxburghe Club. It contains a facsimile of the original edition of the laws of San Francisco, which was known as Yerba Buena prior to 1838, and a fragment about them by Nat Schmulowitz, a member of the JOURNAL'S Advisory Board. Following is an interesting excerpt from Mr. Schmulowitz's comment:

> In view of the problem which the pigeons and seagulls in the downtown public squares of San Francisco present in 1949, it is interesting to note that in 1847 the town council with faint heart sought to conserve its fowls and birds. It ordained that any person killing or maiming "carrion fowls or birds within the limits of this town shall be fined one dollar for each offense". A seagull for indigenous tamales or a good tender squab may have been worth one dollar in 1847.
>
> The firing of a gun or pistol "within one mile of Portsmouth Square" was punishable by a fine of "not less than three nor more than five dollars".
>
> After November 12, 1847, all owners of wells were required to "carefully close and fence or box them up" under threat of a penalty of a $50.00 fine.
>
> Auctioneers, general merchants, sellers of real estate and "spiritous liquors in large or small quantities" were required to obtain annual licenses which cost $25.00, payable "in advance".
>
> The council appropriated $1,000.00 to erect a pier "at the foot of Broadway" to be "not less than ten feet wide and of sufficient heighth to resist the action of the sea and tide and one hundred fifty feet in length". Three members of the council, Clark, Howard and Parker, were designated a committee "to direct, superintend and make contracts" for the materials and work on the pier. Imagine constructing a pier 10 feet wide and 150 feet long in San Francisco in 1949 for $1.000.00!

Arthur T. Vanderbilt:

Chief Justice of the New Jersey Supreme Court

■ This is another in our series of articles on the chief justices of state supreme courts and federal courts of appeal. Though he has been Chief Justice of the New Jersey Supreme Court for only one year, Chief Justice Vanderbilt's long service to American law and the American Bar marks him as one of the outstanding judges in the country. In this account of his career, his sense of honor and fairness, his administrative ability, and his devotion to clean, efficient government are clearly shown. These qualities help to explain the remarkable progress the New Jersey Supreme Court, under his leadership, has made in changing "Jersey justice" from a term of opprobrium to one of great respect.

■ Arthur T. Vanderbilt of Newark was sworn in as a New Jersey Circuit Judge on November 3, 1947, after his appointment by Governor Driscoll four days earlier. It was his first judicial office. This step was a prerequisite to his eligibility for appointment to the new Supreme Court, and at the same time provide the time and opportunity for him to supervise the drafting of the new rules for all the courts in the state. On December 8, 1947, the Governor nominated him, and the Senate on December 15 confirmed him as the first Chief Justice of the new Supreme Court then in formation under the recently-approved Constitution of 1947. The highly respected Newark *Evening News* greeted his judicial appointment with editorial approval, saying:

> No man has worked harder or longer than Arthur T. Vanderbilt for the modernization of New Jersey's judicial system. He has been a pioneer in the movement, and his endeavors have extended over a quarter of a century. . . . Few men at the bar or on the bench possess Mr. Vanderbilt's special qualifications for such a post.[1]

On September 15, 1948, he formally undertook his new duties as New Jersey's chief jurist. His career has been an inspiration to the Bar and justifies the prophecy that ahead lie years of good and effective judicial administration in the state that made "Jersey justice" a national byword.

Early Education in New Jersey

Arthur T. Vanderbilt was born in Newark, New Jersey, on July 7, 1888. At Newark High School one of his classmates was Florence A. Althen, later to become his bride. Graduating at 16, he spent a year of outdoor life with a surveying crew of the Lackawanna Railroad. With four hundred dollars saved from his year's work and some financial aid from an aunt he always affectionately recalls, he entered Wesleyan University at Middletown, Connecticut, in 1906. "Art Van", as he was dubbed by his classmates, developed an amazing ability for work. In college he was in the top ranks of his class scholastically, won a Phi Beta Kappa key, and in four years did the work for both his A.B. and A.M. degrees. He worked his way through Wesleyan by serving as steward of his fraternity and by acting as editor of *The Argus*, a weekly newspaper he transformed into a semiweekly. He found time for extracurricular activities, too. He was manager of the football team and of the Debating Council. He became a member and loyal devotee of the Gamma Phi Chapter of Delta Kappa Epsilon,[2] and was elected to the senior society, The Mystical Seven. He was elected president of both the college body and his senior class, the only man until then to hold both these offices simultaneously at Wesleyan. In college "Art Van" demonstrated a natural talent for leadership, and a congeniality that marked him as a welcome associate. President Shanklin of Wesleyan once remarked that "Arthur T. Vanderbilt was the

1. Editorial, "A Logical Choice", Newark *Evening News*, November 1, 1947, page 4, column 1.

2. "Art Van" has been devoted to his college fraternity all his life. For the past fifteen years he has acted as alumni advisor of Gamma Phi Chapter, and was honorary president of the national fraternity in 1938-1939. The 407-page seventy-fifth anniversary volume of the Gamma Phi Chapter is dedicated to him. In the dedication the editor, James E. Stiles, '13, says: "This Memorial Volume is dedicated to Arthur T. Vanderbilt, firm in the knowledge that his life and devotion to Gamma Phi Chapter have enriched the lives of all of us." Stiles, *Seventy-Five Years of Gamma Phi* (1942) v.

most unusual and gifted undergraduate I have known in all my college experience".

From Wesleyan he went to Columbia Law School, returning in 1912 to take his Master of Arts degree. In 1913 he earned his LL.B. from Columbia. At night he was teaching classes in the Newark Evening High School in addition to preparing for his law classes. Teaching has always fascinated him. In fact, he has always regarded the argument of an appeal and even the trial of a case to a jury as a specialized form of teaching.

Early Years as Lawyer Spent in Newark

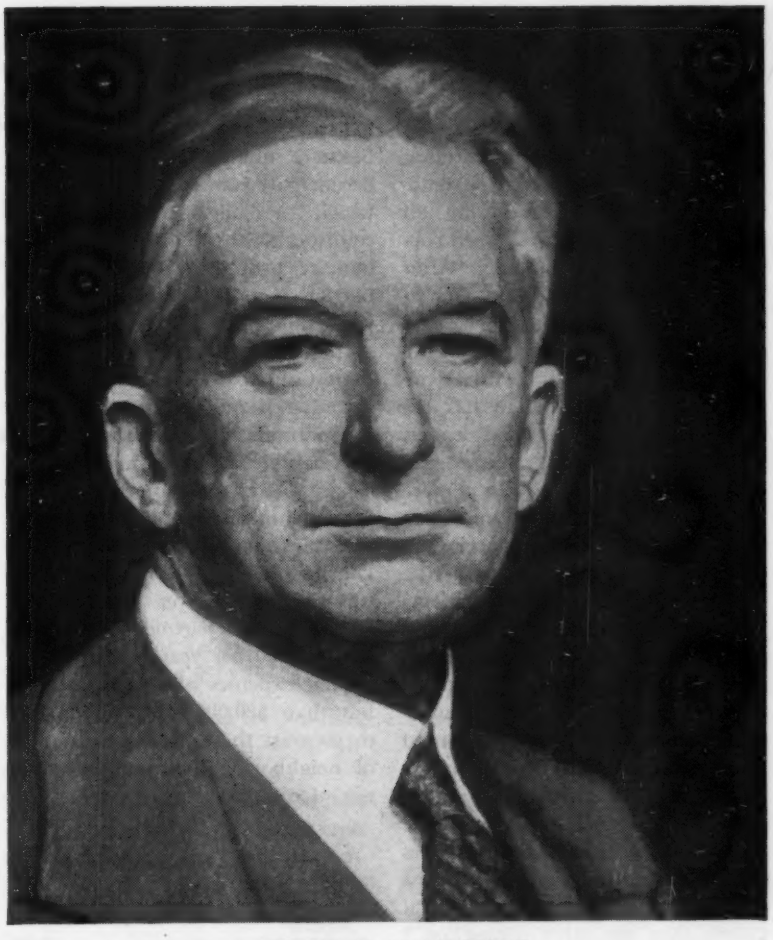
The day following his graduation from Columbia, he commenced his law clerkship under his preceptor, Professor (later Dean) Frank H. Sommer of Newark, for whom he has long cherished a deep and abiding respect and affection. With Professor Sommer's assistance, he was engaged as a law instructor at New York University Law School. Of this he has remarked:

> I was paid $1,400 for teaching five courses—Common Law Pleading, Quasi-Contracts, Wills, Corporations, Bills and Notes. But I was very happy to get it because it gave me an opportunity to get married—that was the luckiest thing I ever did.

This law school relationship continued until June, 1948, when he retired as Dean of the Law School to assume his new judicial duties. In September, 1914, he married his high school classmate, Florence A. Althen, who was destined to become the mother of his three daughters and twin sons.

After completing his clerkship with Dean Sommer, he decided to go it on his own. He opened up his own law office in his native city, Newark, following a course he still advocates to young lawyers. Unlike Brandeis,[3] he does not feel that practicing law in a large firm necessarily produces the best results. He points to the fact that the common law over the centuries was built up by barristers in England who did not go into partnership. If, as Maitland has so well said, the law is a seamless garment, can one really know a part of it if he does not know and see it as a whole? He believes that experts and specialists have their limitations, and that the real lawyer aspires to know the law as a system rather than a piece of it as a specialty. His conviction that we are increasingly in need of men who, while they have the power to cooperate, are capable of thinking things through alone, recalls Justice Holmes' oft-quoted statement:

> In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone,—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will,—then only will you have achieved.



ARTHUR T. VANDERBILT

From the beginning of his private practice the young lawyer showed a preference for trial and appellate work. Over the years well over half of his time has been devoted to court work. Between 1920 and the middle 1930's, his practice was largely representing banks and fire insurance companies. He also acted as counsel in some of the largest equity receiverships in New Jersey, notably, the *Virginia Carolina Chemical Company* case in 1923-25. By 1938 fully half of his professional work came from other lawyers; he had become a "lawyer's lawyer". He was rec-

3. "He [Brandeis] advocated the organization of large law firms because of their greater facilities in specialization. They could give greater efficiency to clients, obtain larger pecuniary rewards, and establish a high reputation, all of which does seem at least as practical as idealistic." Wherry, "Ideals and Canons of the Legal Profession", 20 *N. Y. St. Bar Assn. Bull.* 51, 56 (1948).

ognized as one of the oustanding trial and appellate lawyers in New Jersey. As a lawyer, he had no aversion to the trial of criminal cases, although not many came his way. In the great textile strike in Paterson in 1926 he defended Roger N. Baldwin, Secretary of the American Civil Liberties Union, who had been convicted of unlawful assembly. After his argument before New Jersey's highest court, the court handed down what has been regarded as the leading decision on unlawful assembly in this country.[4] He has defended the noted Socialist leader, Norman Thomas, in free speech cases arising in Jersey City, and more recently secured an acquittal and a reversal of a conviction in a criminal conspiracy case brought by the United States against his clients arising out of World War II government contracts.[5] This latter, the *Michener* case, was the first important war fraud case. In it, the advocate for the defendants was pitted against eight government attorneys in a trial that lasted two months. The statement has been made that "with one exception, he has argued more cases within the last ten years in our State and Federal Courts than any other counsellor."[6] One of his young office associates compiled a list of his legal successes recently. Outstanding is the fact that between May 14, 1928 (*State* v. *Butterworth*, 104 N.J.L. 579), and May 16, 1932 (*Robbins* v. *Passaic National Bank & Trust Co.*, 109 N.J.L. 250), he argued twenty-one cases before the New Jersey Court of Errors and Appeals—and won twenty-one!

Politics and Clean Government Are His Hobbies

Until his recent elevation to the Bench, Arthur Vanderbilt thoroughly enjoyed personal participation in the fascinating American game of politics. He regards it as a hobby. The story of the Clean Government Movement in Essex County, New Jersey, makes interesting reading.[7] High tribute has been paid to its leader. In 1919 the young Newark lawyer succeeded in wresting control of the Essex County Board of Freeholders from the corrupt old-line Republican Party members who had previously dominated it. Then began a quarter century of good, decent government in Essex County which has made it a model for the country. Neither culture, brains or honesty proved to be insuperable barriers to political success for lawyer Vanderbilt.

In 1922, Arthur T. Vanderbilt became County Counsel, a post which he only relinquished upon assuming judicial office. From this position he was able to act in an executive capacity, for no important action could be taken except upon the advice of the county's legal adviser. During his entire term of office he was the only lawyer in the Essex County legal department. His salary was $12,000 per year, and the total annual expenses of the department less than $20,000. It is interesting to contrast these figures with those of neighboring metropolitan counties of comparable size:

	Population	Number of Attorneys	Aggregate Salaries Attorneys
Hudson County, N. J.	690,730	6	$33,600
Nassau County, N. Y.	303,053	4	27,500
Westchester County, N. Y.	520,947	—	50,000

Without claiming for Essex County government a perfection to which it cannot lay claim, an impartial observer is led to conclude that it does stand out like a beacon light of hope for good government.[8]

> No one familiar with the affairs of Essex County will deny that Vanderbilt has exercised a pervasive influence in them or that any other man is so largely responsible for the quality of the results achieved.[9]

He modestly attributes his official longevity to no superior virtues of his own but to the outstanding character of his associates. His own part has been largely in the selection of the best available candidates to run in the primary election each year. In his valedictory remarks as County Counsel, he said:

> The only things which distinguish Clean Government from other political organizations, it seems to me, are, first, our success in attracting superior candidates, and, secondly, our policy of not only expecting but of insisting that each man or woman elected to office do his own thinking and act on his own responsibility without outside dictation. . . . I claim no particular credit for these characteristics of Clean Government, though they do happen to fit in with my political philosophy. I have always wanted primarily to be a good lawyer and one cannot be a good lawyer and still have the time to be a political boss, minding everybody else's business for him.[10]

Mr. Vanderbilt is confident that these policies can be continued. After an exhaustive study of Essex County government, one authority has concluded "that it is possible under modern political conditions to give a great metropolitan county a good and economical administration."[11]

Took Leading Part in Improving Judicial Administration

> Man does not live by law alone. Law is only tolerable because it makes individual liberty possible. Without law, liberty would be non-existent except for a favored one or a favored few. Liberty, then, is the chief concern of the bar as it should be of a democratic government.[12]

4. *State* v. *Butterworth*, 104 N. J. L. 579 (1928).
5. *United States* v. *Michener*, 152 F. (2d) 880 (C. A. 3d, 1945). Of his activities in the free speech cases, it has been said: "In some of these matters, individual lawyers have rendered effective service, of which the most notable is the splendid action of Arthur T. Vanderbilt, President of the American Bar Association, in undertaking the suits of Norman Thomas to vindicate his constitutional rights in New Jersey." Clark, "Conservatism and Civil Liberty", 24 A.B.A.J. 640, 643-644; August, 1938.
6. 23 A.B.A.J. 118; February, 1937. The exception was Merritt Lane (1881-1939), also a Newark lawyer.
7. Reed, *Twenty Years of Government in Essex County, New Jersey* (1944).
8. *Id.* at 96 and 189.
9. *Id.* at 97.
10. Address by Judge Arthur T. Vanderbilt to Clean Government leaders, November 3, 1947. "The Republicans call me the leader; the Democrats call me the boss," Vanderbilt chuckles. "I don't care what anybody calls me so long as our government affairs are conducted in such a way as not to bring shame on the citizens of the community." Stiles, *op. cit. supra* note 2, at 228.
11. Reed, *op. cit. supra* note 7, at 171-172 and 200.
12. "United We Stand", Presidential Address by Arthur T. Vanderbilt, President of the American Bar Association, delivered at the Annual Meeting of the Association at Cleveland, Ohio, on July 25, 1938; reprinted in 24 A.B.A.J. 11, January, 1948.

These words signify one of the leading objectives of the activities of lawyer Vanderbilt during the past two decades. Between 1930 and 1940 he served as Chairman of the Judicial Council of New Jersey. Under his direction the Council prepared a special report outlining the history of New Jersey courts, their defective organization and standards for a revised and simplified judicial system for the state. It submitted a conservative revision of the judicial article of the state constitution which languished in the state legislature due to the opposition of the judiciary and conservative leaders of the Bar. During 1941 and 1942 he was a member of the Constitution Revision Commission which drafted a proposed revised Constitution. After some revisions of this draft by legislative committees, it was submitted to the people in New Jersey in 1944 and defeated at the polls largely because of the militant opposition of Mayor Hague of Jersey City. At Governor Edison's request he served without compensation as Special Assistant Attorney General in opposing legal efforts to defeat a referendum of the constitutional revision question to the people.

On November 4, 1947, by a victory ratio of five to one, the people of New Jersey adopted their new Constitution of 1947. The new Judicial Article, Article VI, represents the work of outstanding American legal scholars in New Jersey and elsewhere, including Dean Roscoe Pound, "the schoolmaster of the American Bar," and Judge Learned Hand of the Court of Appeals for the Second Circuit.[13] Outstanding Administrative as well as judicial reforms have resulted from this constitutional change.[14]

In 1937 Arthur T. Vanderbilt, at the age of 49, was unanimously elected President of the American Bar Association. At the time of his election, he and the Honorable John W. Davis were the youngest Presidents in the Association's history. During that year he traveled to almost every state, flying more than 75,000 miles, urging a program of judicial and administrative reform. It was of this program that Supreme Court Justice Wiley Rutledge remarked, "The American Bar Association had gotten off the track. Arthur Vanderbilt got it back on." As the executive head of our national lawyers' organization, the new President directed his activities toward two main objectives. One was the improvement of the administration of justice, particularly the actual administration of court work. He suggested improvements in the then pending Ashurst Bill providing for the establishment of an Administrative Office of the United States Courts. He opposed dual control of its Director, and suggested an annual report to the Chief Justice of the United States.[15]

Waged Battle for Reform of Administrative Agencies

Not only did he fight for administrative reform in the judicial tribunals, but he waged a strenuous battle for reform in administrative agencies, declaring ". . . what is most needed in our administrative tribunals is more respect for the fundamentals and essentials of the judicial function."[16] He strongly opposed on principle the combination of the rôles of prosecutor and judge which has characterized the numerous newly-created administrative agencies in the state, and in the Federal Government in the last few decades. He opposed the views of James M. Landis, and based his argument on the first and most fundamental principle of natural justice, that is, that a man shall not be the judge in his own case. In so doing he enumerated those characteristics which long experience in his judgment has demonstrated are essential to the exercise of the judicial power to the satisfaction of the people.[17]

> *First:* A judge must be independent of outside control, particularly of executive control.
>
> *Second:* A judge must be secure in his tenure of office, provided he behaves judicially.
>
> *Third:* A judge must be free from political influence.
>
> *Fourth:* A judge is selected for his qualifications for the position.
>
> *Fifth:* A judge lives and acts in a professional atmosphere, guided by a code of ethics evolved from the traditions of the profession which are centuries old.
>
> *Sixth:* A judge must always give reasons for his decisions.
>
> *Seventh:* A judge must always be prepared to have his decisions reviewed.

He did not suggest the abolition of administrative agencies, or that administrative officials should always be lawyers. He said:

> I do submit, however, that when our administrative agencies act as judges they should have the attributes, the working conditions and the professional environment of judges—the safeguards that centuries of experience have demonstrated to be essential to the maintenance and administration of what Blackstone calls common justice.[18]

In 1939 he was named by Attorney General Cummings as Chairman of the Committee to draft a bill creating the Office of Administrator of the United States Courts. The efforts of Attorney General Cummings and his committee resulted in the passage of the act establishing the Administrative Office of the United States Courts (53 Stat. 1223, 28 U.S.C.A., Sections 444-450; August 7,

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13. See English, "State Courts: New Jersey Reorganizes Its Judicial System", 34 *A.B.A.J.* 11; January, 1948.

14. "If the Legislature concurs, New Jersey will be in the van among the states of the country in accomplishing substantial reform of administrative procedure". Editorial, "Jersey Reform", New York *Times*, January 17, 1948, page 16, column 2.

15. "Our Main Order of Business: The Administration of Justice", 24 *A.B.A.J.* 187, 189; March, 1938.

16. *Id.* at 190.

17. "The Place of the Administrative Tribunal in Our Legal System", 24 *A.B.A.J.* 267, 271-272; April, 1938.

18. *Id.* at 273. See also *Report of the Attorney General's Committee on Administrative Procedure, Minority Views of Messrs. McFarland, Stason and Vanderbilt*, reprinted in 27 *A.B.A.J.* 146, March, 1941; "The Federal 'Administrative Procedure Act' Becomes Law", 32 *A.B.A.J.* 377, July, 1946.

The Ancient Roots of the Law:

The Past Rules Us from Its Grave

by Ben W. Palmer • of the Minnesota Bar (Minneapolis)

■ This is the second of Mr. Palmer's two articles on "the ancient roots of the law". He continues the story of one Billy Swift, an iconoclastic modern American who boasted that the past was dead and forgotten by him. In his usual entertaining style, Mr. Palmer demonstrates how wrong Billy was, and, with the help of some scholarly research, illustrates how much our law is indebted to men and nations long dead and buried.

■ Forgery of wills, like legacy hunting was a lucrative employment in the days of the Roman Empire. Notwithstanding manifold copies, seals and a record office, forgery of wills was common in an age characterized by the mad worship of wealth. Juvenal, like satirists in general, may have exaggerated somewhat, but no doubt there was basis in truth for his indignation at meeting "a forger who has achieved wealth and luxury by means of small tablets and a wet signet ring, lolling at his ease in a litter borne by six slaves, and giving himself the airs of a Maecenas in the face of all men".[1] Cicero saw the moral problem in a trick of the forger common to the times, a problem to which all too many were oblivious. In his *De Officiis* he writes: "Certain individuals brought from Greece to Rome a forged will purporting to be that of the wealthy Lucius Minucius Basilus. The more easily to procure validity for it, they made joint-heirs with themselves two of the most influential men of the day, Marcus Crassus and Quintus Hortensius. Although these men suspected that the will was a forgery, still, as they were conscious of no personal guilt in the matter, they did not spurn the miserable boon procured through the crime of others."[2] Cicero himself received all told over $750,000 in bequests. Part of this represented the legitimate gratitude of clients; part of it was in accord with the practice of the period under which insignificant persons made bequests to important personages.

When the father of our friend, the fictitious Billy Swift, died, and his nurse presented for probate a will which left all the estate to her, it was denied validity because it appeared that it had been secured by undue influence. This was resort to a principle at least as old as the law of Solon which made a will valid only if it had not been procured by magic, force or undue influence.[3] She then attempted to rely upon an oral will. But the court held that under the statutes of the state such a will could be made only by a soldier or sailor in active service. This, in turn, was the modern statutory embodiment of the principle of the Roman law which dispensed with the necessity of a writing in the case of soldiers in active service. This was the *testamentum in procinctu,* that is, the will made at the moment of girding oneself for the fray.[4]

The nurse then attempted to claim certain monies, securities and jewels as gifts. She brought an action in replevin to get possession of the gifts, thus resorting to a form of action said to have been invented by Glanvil who died about 1190.[5] And one of the creditors of the estate also attacked, as a fraud upon the creditors, the gifts claimed by her. He was resorting to a principle as old as the Code of Gortyn which was in force about 450 B.C.[6] But the gifts were held invalid because there had been no delivery of possession by Billy's father to the nurse before his death. This requirement of delivery where there was no instrument of transfer is a rule common to all systems of law. It goes back at least to Roman days and was an essential requirement for gifts in English law

1. Juvenal, *Satire,* i, 63.
2. Cicero, *De Officiis,* Bk. iii, xvii, 71.
3. 5 *Encyc. Soc. Sci.* (1931) 287.
4. Thomas, *Roman Life under the Caesars* (N. Y. 1908) 161, 165.
5. Holdsworth, *History of English Law* (3d ed. 1923) 189.
6. Kocourek and Wigmore, *Sources of Ancient and Primitive Law* (1915) 461.

as early as the thirteenth century.[7]

The executor gave notice for creditors to present claims as did an English ecclesiastical administrator of estates in the thirteenth century.[8] One of Billy's brothers had run away from home but was given one dollar in the will so as to comply with the statute providing that unless an heir is mentioned in the will he will inherit the same part of the estate that he would if no will had been made. This statute followed a tradition of "cutting off the heir with a shilling" that existed long before Blackstone wrote his *Commentaries* in 1765.[9] And Billy's mother filed a formal notice in the probate or surrogate court stating that she would not take what the will gave her, but rather what she would be entitled to as a surviving widow under the laws of intestacy. This right of the widow, under the statutes of the state, to share in her husband's estate had its origin in the dower right of medieval law. This was an attempt to provide for the widow of a feudal tenant. It was finally settled at a life interest in one-third of the lands held as a tenant by her deceased husband.[10] So today in many states the surviving widow may claim one-third of her husband's property if there are children, and also a life estate in the homestead.

Homestead Exemption Is Old in History of Law

There were some claims against the father's estate but they could not be enforced as against the homestead, which was beyond the reach of creditors. This is a principle of law based in part upon an ancient desire common to many peoples to encourage and preserve the integrity of the family.[11] Thus it is supposed that the earliest formulation of Roman law, the Twelve Tables of about 400 B.C., contained a provision that the homestead could not be alienated from the natural heir.[12] So later the Roman law provided that the will of the head of a family could be amended by the courts if he failed to leave less than a fourth of his property to his child or children.[13] And similarly in the days of Glanvil and also of Bracton who lived about 1250, the wife and children had certain rights of which they could not be deprived by will. If the wife alone survived she took one-half; if the wife and children, the wife took a third and the children who had not received an advancement from their father in his lifetime took a third. It was only the half or the third that remained over that a man was free to dispose of as he pleased.[14]

The protection of the family was consistent with the feudal rule as to dowry and the modern rule of homestead exemption. And when it came time to pay the debts of Billy's father they were paid out of his personal property rather than his real estate. For real estate for centuries has occupied a preferred position in the law. This has been due in part to the close integration of land ownership and family succession with the English social and political structure for many centuries. And it may have been indirectly derived in principle and sentiment from the rule that prevailed in England until 1286 that a judgment creditor could not proceed against his debtor's lands but only against his chattels.[15] It also had its relationship to that artificial distinction between real and personal property which has so profoundly affected English and American law for centuries. That distinction arose in part out of conflict after the Norman conquest between English barons and the clergy. The former principally controlled the ownership of land and stood for barbaric and later feudal customs. The clergy "contrived to get Roman law applied to goods and chattels which belonged chiefly to their friends, the farmers and townsmen".

It has been said that the history of English law is simply a narrative of the struggle between the law of realty and the law of personality.[16] Thus it is that the laws today in many American states make important distinctions between real estate and personal property with respect to its ownership, transfer of title, descent by will or intestacy, and methods of encumbrance including the filing or recording of mortgages and liens. And the very word "chattels", applied to personal property as distinct from real estate, of course, goes back to the word "cattle" and a time when flocks and herds were the chief form of wealth among a roving people.

Caesar Augustus Imposed Tax Upon Estates and Sales

Billy Swift and the other beneficiaries under his father's will had to pay estate and inheritance taxes. The federal tax had just been increased in order to increase revenues for veterans' aid and to pay the cost of war. So Caesar Augustus in A.D. 6 solved the problem of the ex-servicemen, which had not been solved by the Republic, by establishing two new taxes. One was a sales tax and the other a system of estate taxes. These death duties, like many statutes today, were not levied on property inherited from near relatives or upon very small estates.[17] Even the estate tax of A.D. 6 had been preceded by Greek and Egyptian taxes on transfers of property at death.[18] In Nero's reign Seneca tried to have this tax abolished on the ground that it tended to hamper the economic life of the Empire, but failed.[19] And Nerva suppressed the exceptions in favor of near relatives.[20] Moreover, just as we have tax boards today, so in A.D. 97 Nerva provided for a special *praetor* to

7. 3 Holdsworth 354; 7 *id.* at 505; 6 Encyc. Soc. Sci. 658. That it was *consuetudo* for the widow to have one-third of the fief, see McIlwain, *The Growth of Political Thought in the West* (N. Y. 1932) 186. For Hammurabi and Gaius against cutting off a son, see 1 Simpson and Stone, *Cases and Readings on Law and Society* (St. Paul 1948) 90, and, on family, Maine, *Ancient Law* (1st Amer. ed. 1872) 189.

8. 3 Holdsworth 59, note 3.

9. Radin, *Anglo-American Legal History* (St. Paul 1936) 417.

10. *Ibid.*

11. 3 Encyc. Soc. Sci. 441.

12. 7 *Cambridge Ancient History* 417.

13. Thomas, *op. cit. supra* note 4, at 165, citing *Inst. IV*, 18.

14. 3 Holdsworth 550.

15. Radin, *op. cit. supra* note 9, at 413.

16. 23 Encyc. Brit. (1946 ed.) 606. See also 1 Maitland, *Collected Legal Papers*, 162-201; 358-384, 407-457.

17. 10 *Cambridge Ancient History*, 196-197, 450. See also Wigmore, *Panorama of the World's Legal Systems* (Lib. ed. 1936) 395.

18. 8 Encyc. Soc. Sci. 606.

19. 10 *Cambridge Ancient History* 713.

20. 12 *id.* at 45.

judge cases between the government and private persons involving such taxes.[21] As to the estate of Billy's father, the executor during administration paid an income tax just as there were somewhat similar taxes in the form of occupation taxes in ancient Rome,[22] and taxes operating like graduated income taxes in Greece in the time of Solon.[23] The executor also paid a real estate tax. But the rate was different from that imposed on personal property because of the distinction already referred to between real and personal property. The real estate tax was nearly as old as government. As a tax based on property values, however, a substitute for cruder and less profitable feudal taxation, it had its origin in the Saladin tithe of 1188. This was a tax to help Richard the Lionhearted and others of the Second Crusade to win back Jerusalem and the True Cross.[24]

Billy's mother received a life estate in the homestead under his father's will, an estate well-recognized in early English law,[25] and the most primitive estate in land.[26] Billy and his three sisters each received an undivided one-fourth interest or estate in four pieces of real estate. Each wanted to own one piece alone but they couldn't agree on a division. So they resorted to an alternative available in Roman and early English law and greatly extended during the reign of Henry VIII, an action for partition.[27] Most of the procedural words used by Billy's lawyer and in the lawsuit were of Norman-French or Latin origin, such as the word "complaint". Coming through the French from the Latin "*plangere*" meaning "to lament", its primitive meaning was "to beat the breast". And the word "court" itself, referring to an enclosed space, is associated with the time when judicial business was transacted in the open air.[28] In this case, as in Greece in the fifth century B.C., trial was postponed because of the military service of one of the parties;[29] the depositions of witnesses unable to be present in court were read in evidence;[30] a board like a blackboard was used to clarify facts for the jury;[31] hearsay evidence was objectionable;[32] and argument was made against one of the parties because he had failed to produce evidence which he ought to have produced if his claims were true.[33] And, as in Greece twenty-five hundred years before Billy's case, the time allowed counsel for argument was limited. The only difference was that in Billy's case the attorneys did not refer to the water clock: in Ancient Greece one would complain "the amount of water allotted to me is not sufficient",[34] or "my water has run out".

Finally, when one of Billy's sisters who was dissatisfied with what she got out of the partition suit started another action she failed because of a principle established in English law before 1250, *res adjudicata;* the thing had already been decided.[35] That principle was recognized in ancient Roman law[36] and in Ancient Greece[37] and, when another person started a suit against Billy, the court held that the action was outlawed, following a statute similar to those in force in the time of Demosthenes. Speaking in the fifth century B.C., he attributed the law to Solon who, he said, "since he realized that neither the contracting parties nor the witnesses would live forever—put the law in their place, that it might be a witness of truth for those who had no other defence".[38]

English Revolution Explains Legislative Tradition

In preparation for the trial of this case, Billy's lawyer had occasion, in tracing the legislative history of a new law, to go through the journals of the state legislature. He found there no record of argument or discussion. This followed a tradition going back to the momentous struggle in England more than four hundred years ago between the House of Commons and the Stuart kings. James I, angered because members of the House disregarded his order not to discuss foreign affairs, had sent for the parliamentary record of their claim to free speech and torn out the offending page. In 1628, when Charles I was asserting the divine right of kings by enforcing martial law in time of peace, denying free speech and arbitrarily imprisoning subjects, including members of the House of Commons, that body passed a resolution forbidding its clerk to take notes of speeches or debates. This was to protect the members of the House from the King because of their opinions. So the practice was established of recording in such a parliamentary body not what was said, but only what was done.

As a result of the partition suit Billy received a vacant lot in the business section of his city. Planning to build on it, he had a survey made which showed an encroachment by a neighboring building. Billy became involved in a lawsuit over his boundary. The judgment was similar to the earliest civil judgment of which we have record, one made in 117 B.C.[39] As to the encroachment, the court, following a rule similar to one established in the Roman law, held that the building had been there so long that its owner had acquired title

21. 11 *id.* at 193.
22. Tucker, *Life in the Roman World of Nero and St. Paul* (N. Y. 1910) 87.
23. 3 Grote, *History of Ancient Greece* (3d ed. 1851) 160.
24. 5 *Cambridge Medieval History* (1929) 324.
25. 2 Holdsworth, 262, 349; 3 *id.* 120.
26. Plucknett, *Concise History of the Common Law* (Rochester 1929) 363.
27. 2 Holdsworth 321; 3 *id.* at 19; 4 *id.* at 483; 6 *id.* at 398; 17 *Encyc. Brit.* 345.
28. Millar, "The Lineage of Some Procedural Words", 25 *A.B.A.J.* 1023 *et seq.*, December, 1939.
29. Demosthenes, *Against Olympiodorus*, 25.
30. Bonner, *Lawyers and Litigants in Ancient Athens* 187; Demosthenes, *Against Lacritus*, 21. Whether a barber who cut a man's throat because his hand was hit by a ball was negligent, see Schulz, *Principles of Roman Law* (Oxford 1936) 61.
36. Radin, *Roman Law* (19—) 167.
31. Demosthenes, *Against Macartatus*.
32. Demosthenes, *Stephanus*, 7; *Against Eublides*, 4.
33. Demosthenes, *Against Eublides*, 34; *Against Aphobus*, 5.
34. Demosthenes, *Against Stephanus*, 48.
35. 2 Holdsworth 250, citing Bracton.
36. Radin, *Roman Law* (1927) 167.
37. Bonner, *Lawyers and Litigants in Ancient Athens* (1927) 41; 2 Bonner and Smith, *The Administration of Justice from Homer to Aristotle* (1930) 256.
38. Demosthenes, *For Phormio*, 27; *Against Nausimachus*, 6; Bonner, *Lawyers and Litigants in Ancient Athens* (1927) 41; 2 Bonner and Smith, *op. cit. supra* note 37, at 88-90, 106. Limitation of actions was unknown to Roman law almost without exception. See Schulz, *op. cit. supra* note 30, at 249; also, Sohm, *The Institutes of Roman Law* (3d ed. 1907) 282.
39. Wigmore, *Panorama* 384.

to the land beneath by adverse possession. The length of time necessary to acquire such a title was fixed by a state statute similar to an English statute of 1275. This had fixed a definite period of occupancy as a basis of title in place of "a time whereof the memory of man runneth not to the contrary."[40]

After Billy's boundary suit had been decided he entered into a building contract very similar in completeness and detailed specifications to one made in Puteolis in 105 B.C. for the construction of a gateway pursuant to the following city ordinance:[41]

> [Date.] In the ninetieth year since the founding of the Colony, under the magistrate Numerius Fufidius, son of Numerius, and Marcus Pullius and the consuls Publius Rutilius and Gnaeus Mallius.
>
> *Of Public Works, Lex No. 2*
>
> [Subject.] Proclamation for the construction of a wall in the court in front of the temple of Serapis across the street. Whoever shall be awarded the contract shall furnish bondsmen, secured by real estate, to the satisfaction of the magistrates.
>
> [Specifications.] In the court across the street, where now stands a wall near the street, in said wall at the middle point, he shall open a gateway, and shall make this 6 feet wide, and 7 feet high. From said wall on both sides of the gate he shall make two pilasters, and he shall make the two pilasters on the side towards the sea project 2 feet long by 1¼ feet thick. Over said gate he shall place a lintel of oak 8 feet long, 1¼ feet wide, and ¾ feet high. Over this lintel and the pilasters he shall be required to lay two beams of oak 8 inches thick, 1 foot high, and projecting from the outer and the inner side of the wall 4 feet. To this he shall attach with iron nails a decorated moulding. Over said projecting beams he shall place two small transverse beams of fir, 6 inches square, and shall fasten these with iron nails. He shall thereon lay rafters of cut fir, 4 inches by 4 inches, and said rafters he shall space not farther than 9 inches apart. On the rafters he shall place sheathing of fir, made of foot timber. A facing of board of fir, 9 inches by ½ inch, with ogee moulding, he shall attach, and fasten the same with flatheaded iron nails.
>
> The said gate-way he shall cover with tile roofing, using six pieces in each row reckoning both sides of the gate, laid in squares. All the border tiles shall be fastened to the facing board with iron nails; and over the upper row of tiles as a ridge piece he shall place the coping of the wall.
>
> The said contractor shall make two latticed doors, with winter-oak door posts, shall set them up, fit the lock, and finish them with pitch, after the pattern of the doors at the Temple of Honor.
>
> Likewise the wall which forms the outer boundary of the court away from the street, said wall with its coping he shall make 10 feet high. Likewise the door which now serves as an entrance in the court, and the windows in the same wall opening upon the court, he shall be required to wall up. Furthermore, upon the first wall aforesaid, standing now adjacent to the street, he shall place a continuous coping.
>
> All these walls and their coping throughout, where not surfaced, he shall dress with a mortar of lime and sand, smoothed down, and then cover with properly prepared white-wash. In the mortar which shall be prepared for the wall, he shall use in three parts of Puteolan earth one part of slaked lime. And in the structure of the wall, he shall neither build in any stone larger than shall by dry measure weigh 15 pounds, nor make the corner stones higher than 4½ inch.
>
> The ground he shall clear of all debris after the work.
>
> [The Area Sacra.] Furthermore, the shrines, altars, and statues which are now in the campus, and which shall be later designated to him, all these he shall remove, carry to the enclosed court, arrange and set up in such a position as shall have been designated according to the judgment of the two mayors.
>
> [Conditions of Approval.] All the aforesaid work the contractor shall do according to the judgment of the two mayors and of their associates in the council of Puteolis, provided not fewer than twenty of them shall be present when this matter is considered. Whatever as many as twenty of them shall under oath and by majority vote approve, shall stand approved; whatever they shall reject, shall stand rejected.
>
> [Time Limit.] Time for the completion of the work: The first day of November ensuing.
>
> [Payment.] Time of payment of money: One half shall be paid down as soon as the bonds secured by real estate shall have been executed: the other half upon the completion and acceptance of the work.
>
> [Signed.] C. Blossius, son of Quintus, (undertaking the contract for) 1500 sesterces, (and offering) security to that amount.
>
> Q. Fuficius, son of Quintus
> Cn. Tetteius, son of Quintus
> C. Granius, son of Gaius
> T. Crassicius
>
> Guarantors

When the lawyer for Billy's contractor dictated the building contract he consulted the municipal building code just as was necessary in 21 B.C. to keep in mind a provision of the Code of Hammurabi: "If a builder build a house for a man and do not make the construction firm, and the house which he has built collapse and cause the death of the owner of the house, that builder shall be put to death." So also in China at least as far back as 1000 B.C. there were regulations of the height, depth and breadth of buildings, the number of courts and similar details. Moreover in ancient Rome laws regulated party walls and other matters of construction.[42] Augustus limited the height of buildings to seventy feet, Trajan to sixty, and Nero to twice the width of the street.[43] The pioneer English building code was made in 1189 during the reign of Richard I; and during the reign of Edward I there were many London by-laws governing the repair and demolition of buildings, encroachments, gutters, sanitary arrangements and fires.[44] Thus in 1419, suggesting a blackout, we find: "If any house in the said city be so much alight that the flame of the fire can be seen from the outside of the house, he who is dwelling in the said house shall pay the sheriff 40 s in a red purse."[45] And in the location of his building Billy had to conform to a city plan just as there were city plans in ancient Babylon, Ashur and Nineveh, and in the fifth century B.C. in Piraeus, Rhodes, and Cyrene. Rome also had what would now be called zoning ordinances, not only controlling building heights but keeping

(Continued on page 796)

40. 3 Holdsworth 169; 7 *id.* at 343-352; Salmond, *On Jurisprudence* (9th ed. 1937) 265; 18 *Encyc. Brit.* 450.
41. Wigmore, *Panorama* 389-393.
42. 3 *Encyc. Soc. Sci.* 52
43. *Id.* at 482.
44. *Id.* at 52.
45. 2 Holdsworth 391.

The Survey of the Legal Profession:

Second Progress Report

by Reginald Heber Smith • of the Massachusetts Bar (Boston)

■ Eighteen months after it received its first funds, the Survey of the Legal Profession has made great progress although much work yet remains to be done. In this article, Mr. Smith does not evaluate the Survey's work to date—it is too early for that, he observes—but he takes stock of its work to the present, showing what has been done, and what lies ahead in the plans of the Survey.

■ In April, 1948, the Survey of the Legal Profession received its first funds. Plans began to materialize. In September the JOURNAL published the first progress report. Now, twelve months later, the time has come to take stock of the Survey's accomplishments to date.

Taking stock in the inventory sense is all that I shall attempt here. The task of evaluation must wait until the Survey has gone a good deal further.

Statistically, the Survey's record since the first progress report shapes up as follows:

Completed Reports	10
Reports Being Prepared	64
Additional Report Writers	28
Additional Topics	18

During the period under review the Council met twice, once last fall in New York and again in Washington this spring. Three new members were elected: Devereux C. Josephs, President of the New York Life Insurance Company, New York City; Harold G. Moulton, for twenty-seven years President of Brookings Institution, Washington, D. C.; and Charles E. Dunbar, Jr., New Orleans.[1]

Paul G. Hoffman resigned from the Council because of the pressure of his duties as ECA Administrator.

Seriatim Reports and a "Dynamic" Survey

The Council has come to the conclusion that Survey reports should be published when they are completed, not held up for a comprehensive final report.

Once a report has been reviewed by the Director and the Publications Committee of the Council (William Clarke Mason, Devereux C. Josephs, and Charles P. Curtis), there is no good argument for withholding it and there are excellent reasons for releasing it.

The criticisms and corrections occasioned by publication and wide distribution will make most reports more complete and reliable. We hope to make the Survey "dynamic" and not a mere agglomeration of information.

Reports that have weathered the onslaught of critical readers and have been duly amended will provide a sturdy basis for the report I shall endeavor to write for the American people, lawyers and laymen alike, when the Survey is done.

Ten Reports Have Been Completed

The ten completed reports are:

1. "The Family and the Law", by Professor Earl Lomon Koos, Department of Sociology of the University of Rochester. This was published by the Survey and distributed widely by the National Association of Legal Aid Organizations.

It was based on a study of more than 4000 families, divided equally in middle-income and low-income categories, and living in Akron, Atlanta, Nashville, Oakland, Rochester and Seattle. The report demonstrates that many persons with problems for a lawyer do not realize that he can help. Or, even if they do realize, fail to consult one, generally because of fear of lawyers' charges.

2. "Surveying the Legal Profession: In Whose Interest, How, and to Test What Hypotheses?" by Charles O. Porter, my assistant, appeared in the *Journal of the American Judicature Society*, February, 1949. It told how the Survey was originated, what methods were being

1. The other members of the Council are Howard L. Barkdull, Cleveland, Ohio; James E. Brenner, Stanford University, California; Herbert W. Clark, San Francisco, California; Charles P. Curtis, Boston, Massachusetts; John W. Davis, New York City; John S. Dickey, Hanover, New Hampshire; Albert J. Harno, Urbana, Illinois; Frank E. Holman, Seattle, Washington; William Clarke Mason, Philadelphia, Pennsylvania; Orie L. Phillips, Denver, Colorado; Carrol M. Shanks, Newark, New Jersey; Reginald Heber Smith, Boston, Massachusetts; Robert G. Storey, Dallas, Texas; Arthur T. Vanderbilt, Newark, New Jersey.

used, and indicated some of the preconceptions under examination. Seven hundred and fifty copies were sent to Survey personnel, presidents of state and major local bar associations, editors of legal periodicals and others.

3. "The Organized Bar in Russia", by Professor John N. Hazard of Columbia University, was published in the March, 1949, JOURNAL. It has been highly praised.

4. "The New Philadelphia Lawyer", by Robert D. Abrahams of the Philadelphia Bar, will appear in the October *Atlantic Monthly*. This report tells of the unique "Neighborhood Law Offices" which Mr. Abrahams godfathered and still supervises.

5. "The Organized Bar in France", by Pierre Georges Lepaulle of Paris, has not been placed for publication at this writing, having but recently been reviewed by the Publications Committee.

6. "Complaints Against Lawyers" is a memorandum which I prepared for the Survey's Advisory Committee of Laymen. It will be available for general distribution after the Laymen's Committee revises it so as to make it their own consensus.

7. "The English Legal Assistance Plan: Its Significance for American Legal Institutions", was prepared by me, with the help of Thomas G. Lund, secretary of the Law Society in England, and published in the June JOURNAL.

8. "Statistical Report on the Lawyers in the United States", prepared by Edward J. Nofer, Vice President and General Manager of the Martindale-Hubbell Law Directory Company, assisted by William Hildebrand, Jr., Second Vice President of the same organization.

This unprecedented report is a tabulation of the data in the Martindale-Hubbell Law Directory. For the first time in our history, reliable information with respect to the number of lawyers, their geographical distribution, sex, age, ratings, education and type of practice is available. Moreover, because the "punched cards" of the International Business Machines Corporation were used, any correlation of these data may be made.

The cost, more than $20,000, was met entirely by the Martindale-Hubbell Company. This contribution made the project possible, because the Survey's funds were inadequate for any such undertaking.

It is Martindale-Hubbell's plan that the data be kept up to date by revising the punched cards as new editions of their Law Directory are prepared.

Fifty-six copies of the report were published for the Survey. They have been given or lent to various individuals and organizations to be analyzed. Ultimately most of the copies will be presented to law libraries.

It is only fitting and an act of simple justice for me here publicly to acknowledge the great debt the Survey of the Legal Profession owes to Martindale-Hubbell for its cooperation and generosity.

This material will be used by most of the members of the "Survey team" and by many other scholars and public officials.

No list of this magnitude could hope to attain perfection. One or two areas present stubborn problems. This list, however, is the best obtainable by far and is entirely adequate for all practical purposes.

9. "Lawyer Reference Plans in the United States", by Charles O. Porter, my assistant, with the invaluable guidance of Walter T. Fisher, the Survey's Consultant for this topic, will be published later this month and distributed to bar organizations. It is a manual on lawyer reference plans, based on a careful study of the thirty existing plans.

Here is an opportunity for bar associations to bring the lawyer to the client, and the client to the lawyer, in a tested and ethically proper manner under bar association auspices.

10. "Representation before State Administrative Agencies", by the Honorable George Rossman, Associate Justice of the Oregon Supreme Court. This report was just completed and will soon be passed on to the Publications Committee.

Sixty-Four Reports Are Being Prepared

Below is a list of the reports now pending and the names of the men responsible for them. I remind you that every contributor is a volunteer, excepting only the Survey's four research workers.

All the extensive field work has been done in the Legal Aid and Public Defender study and also in Admission to the Bar. Professional Ethics, Discipline and Disbarment is progressing very well. These major topics include many reports not named in the list below.

As expected, the Legal Education study is proving to be a ponderous task. The Organized Bar, Division VI, has been somewhat held back by difficulty in finding men to prepare reports on urban bar associations.

So much for comments. The following topics and names speak for themselves. Those added since the first progress report are in capital letters.

Division I

Professional Services by Lawyers and Availability of Services

Litigation: "Vital Statistics" (Civil)	HARRY D. NIMS
Services to Organized Labor	J. ALBERT WOLL ARTHUR J. GOLDBERG ROBERT M. SEGAL
Salaried Services in Business: General Counsel	CHARLES S. MADDOCK
Legal Aid: General	Emery A. Brownell
Legal Aid: Civil	Emery A. Brownell
Legal Aid: Criminal	Judge Martin V. Callagy
Salaried Services in Government: State	EARL G. HARRISON
Workmen's Compensation	Joseph Bear

Legal Clinics	Professor Quintin Johnstone

Division II
Public Service by Lawyers

Legislation	Professor Harry W. Jones
Arbitration	Frances A. Kellor
War Work	General Edmund R. Beckwith
Public Relations	George M. Morris
War Staff Non-Legal Work	Robert P. Patterson Professor W. Barton Leach
Divorce	Judge Paul W. Alexander
Civil Service	H. Eliot Kaplan
Publications	Muriel E. Richter
Lawyer in Municipal Government	Murray Seasongood
The Lawyer and the Community	Alex Elson

Division III
Judicial Service and Its Adequacy

Courts: Judicial Administration	Judge John J. Parker Judge R. S. Wilkins
Courts: Criminal Law	Judge Alexander Holtzoff
Courts: Judicial Conferences and Judicial Councils	Dean Maynard E. Pirsig
Administrative Agencies: Federal	Carl McFarland

Division IV
Professional Competence and Integrity

Legal Education: Law Schools	Dean Albert J. Harno
Inspection of All Law Schools	John G. Hervey
Who Should Study Law	Homer D. Crotty
Non-Legal and Quasi Legal Materials in Legal Education	Professor Brainerd Currie
Legal Education in Other Countries	Professor Claude Horack
The Young Law School	Dean Lowell S. Nicholson
Intellectual Discipline	Dr. Kenneth W. Tillotson
Placement	Louis A. Toepfer
Pre-Legal Education	Chief Justice Arthur T. Vanderbilt
Post-Legal Education	Robert G. Storey Herbert W. Clark
Association of American Law Schools	Professor Russell N. Sullivan
Law Libraries (aside from those at law schools)	Paul B. DeWitt
Admission to the Bar	Professor James E. Brenner
Professional Ethics, Discipline and Disbarment	Judge Orie L. Phillips

Division V
Economics of the Legal Profession

(General)	Isidor Lazarus
Number and Distribution of Lawyers	Charles B. Stephens
Financial: Income, Overhead, Taxes	William Weinfeld (U.S. Department of Commerce)
Organization: Partnerships, Solo Practice	Eugene C. Gerhart

Division VI
The Organized Bar

Evolution of Bar Associations	Dean Roscoe Pound
American Bar Association	Judge Ransom had agreed to be our Consultant. Following his death Philip J. Wickser has been asked to take over.
National Bar Association	Euclid L. Taylor
National Association of Women Lawyers	Charlotte E. Gauer
National Lawyers Guild	Alex Elson
Federal Bar Association	Heber H. Rice
National Group Associations:	
American Patent Law Association	John A. Dienner
State and Local Bar Associations	Charles B. Stephens
Junior Bar Conference	James D. Fellers
History of the Bar	Professor Richard B. Morris
The Bar in Canada	Dr. Cecil A. Wright
The Bar in England	T. C. Lund
The Bar in Italy	Angelo Piero Sereni
The Bar in Switzerland	Paul Lachenal
Civil Law States	Dean Paul Brosman
Metropolitan Bars: New York	Albert P. Blaustein
Metropolitan Bars: Los Angeles	James C. Sheppard
Metropolitan Bars: Boston	Dean Lowell S. Nicholson

Several members of the Council have agreed to prepare special reports for us as follows:

Methods of Strengthening Bar Association Organization	Howard L. Barkdull
The Function and Opportunity of the Lawyer in the International Arena	John W. Davis
Relation between the Lawyer and the State, and the Strategic Position of the Lawyer Therein	John S. Dickey
The Layman Looks at the Lawyer's Work	Carrol M. Shanks

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THE PRESIDENT'S PAGE

FRANK E. HOLMAN

▪ This being my last "President's Page", it is in the nature of a valedictory. The year has been full of memorabie experiences—all of them pleasant and interesting. I find a camaraderie among lawyers everywhere and a common purpose to uphold right and justice. Lawyers do not always agree on the means and the methods—either procedural or political—for securing justice, but they dedicate themselves and their lives to its attainment. They are all practitioners in the achievement of justice.

No movement in the history of the world for the improvement of man's condition and the establishment of justice among men has ever succeeded without the influence and the leadership of great and courageous lawyers. Yet lawyers generally are likely to devote themselves to the championship of individual freedoms and private rights and are not inclined to act together against trends in law and government which actually imperil individual liberty and private rights. They often fear that group action on their part may be interpreted as political—as taking a position for or against the program of a particular political party.

I am sure that a majority of the lawyers in this country—East and West, North and South—are opposed to measures that lead to statism and are inimical to individual rights and freedoms. Many such measures are now pending, but lawyers for the most part remain inarticulate so far as acting together through the organized Bar, and with a united voice is concerned.

When the organized Bar speaks, as it did in connection with the "court-packing plan" several years ago, the Bar of America exercises a potent influence. More than twenty years ago the American Bar Association took an active interest and a definite part in conducting a nationwide campaign to educate, or rather, re-educate, the profession and the people of America to a proper appreciation of constitutional government. This campaign was largely conducted through the leadership of R. E. L. Saner of Texas who was President of the Association in 1923-1924. For a number of years, not only the Bar but the schools and colleges of America have been derelict in this field of education, with the result that various forms of statism have infiltrated and superseded the basic concepts of constitutional government. As a parting word to our members I should like to urge that the American Bar Association, as an organization, take a more definite interest in current trends in government and, through its Committees and Sections, give earnest attention to the preservation of our Federal Republic and to the institutions and liberties which have made our nation great and our people free.

Through this page I want to express to the officers of the numerous state and local bar associations that I have visited during the year my very great thanks for their uniformally generous treatment of me and my speeches. I particularly appreciate their unfailing hospitality to Mrs. Holman whenever she was able to accompany me on my travels.

During the year I have had three opportunities of visiting Canada—first as a guest of the British Columbia Bar Association at Victoria, then at Montreal at one of the Canadian Regional Conferences held to study the International Bill of Rights program, and finally at Banff at the Annual Meeting of the Canadian Bar Association. All of these experiences were pleasant and stimulating. There is a genuine feeling of personal friendship between the members of the Canadian and American Bars and a spirit of cooperation and common purpose between the organized bar associations of the two countries.

To have had contact with state and local bar associations throughout the United States in more than thirty states, and to have had the opportunity of visiting and meeting with the lawyers of Canada on three different occasions, would seem to have been sufficient for any President of our Association during the course of his year in office. Added to this, in the month of July I had the opportunity of visiting Europe with Mr. Jacob M. Lashly of St. Louis, a former President of the Association. We were the guests of the Paris and Rome Bars and spent a week in London renewing old friendships and making new ones with the distinguished members of the English Bar. Elsewhere in this issue of the JOURNAL you will find an account of this European journey as related by Mr. Lashly, who, as Chairman of the Committee on Assistance to Lawyers in Devastated Countries, is entitled to the thanks of the Association for having developed between the American Bar Association and the French and Italian Bars a friendly relationship of the utmost international importance.

Over a long period of years we have had an intimate and friendly relationship with our brethren of the English Bar, but we were little known and little understood by the members

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *Walter Preston Armstrong, 1884 - 1949*

Fifteen years ago Walter Armstrong was elected a member of the Board of Editors of the JOURNAL. Except for the year immediately following his presidency of the Association, his service on the Editorial Board was continuous until he died suddenly on July 27 of this year in the midst of a trial.

Never did editor with greater modesty more steadfastly carry his share of the load, more willingly contribute effectively and continuously to help sustain the excellent character of our magazine.

Everything he wrote was sound in substance and of high literary quality.

He was an omnivorous reader, a scholar as well as a great lawyer.

It is hard to believe that he enjoyed his profession more than this avocation of his to which he brought such brilliant talents. Even as he sat upon the wide porch of his lodge on the shore of his beloved little lake, looking out over its quiet waters where they sparkled in the sun between the trees that rose up through their surface, and contemplated with tranquillity the forthcoming matching of his wits with those of the gamey bass he loved to catch, even as he rested there for a brief spell, his book lay open before him, scanned for review, or awaiting attention while he gave himself to reveries, planning, perhaps, some further venture with his pen to delight the minds of his myriad admiring readers.

To every request that he write something for the JOURNAL or give editorial help of any sort his response was quick and sure and gracious. His genius was never-failing, his interest never flagged, he was untiring, and loyal always to his associates in the forwarding of their common project, ever eager to assist in the maintenance of the highest of standards.

For him, among those who knew him and worked beside him, there was nothing but admiration and affection. With him there has gone forever something very special from the pages of the JOURNAL—something of life and brightness, warm and vivid.

■ *Congress Should Act*

[This, the last of many articles prepared by Walter P. Armstrong for the JOURNAL, was found on his desk after his untimely death.]

The Supreme Court's Advisory Committee on Rules of Civil Procedure deserves far greater public acclaim than it has yet received. The Rules and Amendments constitute an epochal law reform comparable to that of the English Judicature Act.

While each member of the Committee has shared the burden, especial credit is due the Chairman, former Attorney General William D. Mitchell, and the Reporter, Judge Charles E. Clark.

It is highly regrettable that the adoption of the Amendments did not signalize the completion of the Committee's work upon procedure, leaving it only the task, upon which it has not yet embarked, of compiling a code of evidence.

That the Committee has not succeeded in definitely fashioning federal procedure is due to the difficulties it has encountered in framing a "condemnation rule". Such a rule appeared in the Committee's report of April, 1937, but was withdrawn in the First Report of November, 1937. Later drafts appeared in May, 1944, and in June, 1947, while in May, 1948, the Committee made a final report and recommendation to the Supreme Court. Instead of promulgating the proposed rule the Court has rereferred the subject to the Committee for further consideration and another report.

In an informative and thoughtful article in the current issue of the *Ohio State Law Journal* Judge Clark discusses the problems posed for the Committee in drafting this rule. Most of these problems the Committee, by careful consideration, good judgment and with apparently inexhaustible patience, has succeeded in solving. Indeed, only one major problem—the method of trying the issue of just compensation—remains. For the resolving of this the Supreme Court has now rereferred the proposed rule to the Committee.

At the risk of oversimplification it may be stated that the question is whether eminent domain cases shall be tried before a jury or initially by a commission with a right of appeal to the courts. There is no constitutional right to a jury trial; property owners prefer it and the Department of Justice has favored it. Indeed, the only clamant objection has come from the Tennessee Valley Authority. The TVA Act provides for the assessment of damages by three commissioners with a right of

appeal to a district court of three judges who try the case *de novo* and may hear additional testimony. On appeal to the court of appeals there is another *de novo* hearing. This is probably the most cumbersome, dilatory and expensive eminent domain proceeding ever devised by the wit of man.

So far, however, the TVA has succeeded in persuading the Committee to exempt it from an otherwise uniform procedure. In fact, the obduracy of the Authority is so far responsible for blocking complete uniformity of federal procedure. TVA clings to its view that every one in the company is out of step but Johnny.

So far the Committee has failed to use its influence to bring the company into step. One answer would be to have everyone else catch step with Johnny, for while it is arguable that commissioners may be superior to jurors and that expense and delay should not be considered, there is no reason to insist that uniformity is not attainable.

So long as the Committee vacillates without taking a firm position and the Supreme Court is unwilling to assume the initiative there is only one course that will ensure uniformity. Congress in appropriate legislation should express its choice between jury trials and the commission system. Whatever the choice the result will be complete uniformity, which does not seem otherwise attainable.

We make this suggestion with extreme reluctance for our unshaken conviction is that wherever possible procedure should be regulated by rule of court. In this instance, however, the Committee and the Court have persuaded us that there is no other practicable course.

■ *Mr. Justice Murphy*

On July 19 the nation was saddened by the unexpected news of the death of Mr. Justice Murphy at the early age of 59. His rise from poverty to national prominence and a place on the Supreme Court makes his life another example of the freedom of opportunity America still offers the diligent.

Frank Murphy began his public career as a municipal judge in Detroit. He later became mayor of that city. An ardent New Dealer, he attained national prominence when President Roosevelt appointed him Governor-General of the Philippines and later High Commissioner to the Philippines. Subsequently, while he served his home state of Michigan as its governor, he was a leader in reform movements. His handling of the sit-down strikes in the automobile plants during his term was hailed by labor but roundly condemned by other elements in the community. He later became a member of President Roosevelt's cabinet, serving as Attorney General. In 1940 he was appointed to the Supreme Court, thus attaining the peak of a lawyer's ambition.

His associates sensed in him an attitude of deep reli-

gious feeling, somewhat ascetic and mystical, yet idealistic and sympathetic. He was a devout Roman Catholic, a man of deep spirituality with an almost priestly mien on the Bench. He regarded himself as a judge in the liberal tradition. His opinions reveal his sympathy for the rights of "little people", especially in civil rights cases. He wrote vigorously when aroused, reflecting his own motto, "Speak softly and hit hard".

As a Supreme Court Justice, he was a controversial figure. Accused of sentimentalism and emotionalism, of an unlawyer-like disregard of precedent, his patent policy was to prefer justice as he saw it to the logic of legal precedents. In his passing the nation has lost a public servant who devoted his life to the cause of righteousness as he conceived it and whose sincerity of purpose cannot be questioned.

■ *The Terminiello Case*

The much discussed *Terminiello* case is one where a majority of the United States Supreme Court took a highly artificial and academic view of the proceedings below and thereby accomplished the reversal of the conviction of a suitor who invoked the Court's power in the name of free speech.

Terminiello was convicted of violating an ordinance of the City of Chicago making guilty of disorderly conduct "all persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace". He had addressed a meeting of the Christian Veterans of America called and presided over by Gerald L. K. Smith. As the majority expressed it: "The meeting commanded considerable public attention. The auditorium was filled to capacity with over eight hundred persons present. Others were turned away. Outside of the auditorium a crowd of about one thousand persons gathered to protest against the meeting. A cordon of policemen was assigned to the meeting to maintain order, but they were not able to prevent several disturbances. The crowd outside was angry and turbulent. Petitioner in his speech condemned the conduct of the crowd outside and vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare." Some of the epithets he used were "slimy scum", "snakes" and "bedbugs".

At the trial he maintained that his conduct was protected by his right of free speech guaranteed by the First Amendment. The prosecution contended that the words that he had used were the "fighting words" which, under the doctrine of *Champlinsky* v. *New Hampshire*, 315 U. S. 568, are not within the protection of the Bill of Rights. The lines of battle so drawn remained unchanged through two state appellate courts and through argument in the United States Supreme Court.

The opinion of the Court, however, written by Mr. Justice Douglas for a majority of five, construes the judge's charge *in vacuo* and proceeds upon the theory that the ordinance, as explained to the jury, permitted a conviction though the words used did not descend to the constitutional standard of "fighting words" and that, since the conviction may thus have been based upon a finding by the jury of conduct which was protected by the Constitution, the conviction cannot stand. The majority were evidently of the opinion that a finding by the Court that the words were "fighting words" would not cure the defect since the majority stated that it did not reach the question of "fighting words" *vel non*.

Mr. Chief Justice Vinson and Mr. Justice Frankfurter, in separate opinions, with Mr. Justice Jackson and Mr. Justice Burton joining Mr. Justice Frankfurter, took the position that the point was not raised below and that, therefore, under the fundamental principles of the jurisdiction of the United States Supreme Court, the state court could not be reversed.

The majority's position on that question was that the point was raised when Terminiello said that the ordinance as construed and applied to him was unconstitutional.

That was the rock on which the Court split—whether the point had been sufficiently clearly raised in the state court to permit the Supreme Court to make it the basis of reversal.

It certainly does not seem to be a matter of world shaking importance. The rule that the point must have been raised below is easier to state than to apply. The question under it is one of degree. Of course it could not be contended that, when Terminiello said that his words were not "fighting words", he was raising the Supreme Court's point that the statute was unconstitutional because it permitted a conviction based on something less. The majority, however, holds that he did raise that point when he said "the ordinance as construed and applied to me is unconstitutional". It is doubtless true that those words, as a matter of pure logomachy, embrace the point, but they had no tendency to convey the idea to the lower courts. It is hard to imagine any complaint of unconstitutionality against action pursuant to a statute that would not be embraced by them. Few lawyers will be so naive, however, as to hope that they may make a constitutional point specifically in support of some harassed business client and, by using Terminiello's magic words as a sort of prayer for other and further relief, save all other constitutional points that may later occur to them. It is not likely that the Supreme Court has opened upon itself the floodgates of constitutional questions merely adumbrated below.

What is serious is that Terminiello, in this liberal procedural ruling, received specially favorable treatment from the Supreme Court. Why? The answer would seem to be because he invoked the right of free

speech. Surely on the actual facts there was no reason for particular tenderness toward him. Mr. Justice Jackson demonstrates the truth of that when, after agreeing with Mr. Justice Frankfurter that the majority's point had not been raised and thus should not have been the basis for reversal, he construes the charge in the light of Terminiello's conduct and says that such conduct is not protected by the First Amendment.

Is not the decision an example of that substitution of words for things which Mr. Justice Story had in mind in 1835 when, in remarking that the argument of a case had taken too long, he said: "But this is the very region of words; and Americans, I fear, have a natural propensity to substitute them for things"? That is an almost irresistible propensity in all whose experience is with papers instead of with the things that the papers at best faultily represent. Terminiello was no more entitled to special consideration because he called himself the victim of deprivation of freedom of speech that he was entitled to be presumed to be a Christian when he identified himself with the Christian Veterans of America. It is well to bear in mind that even under infinite mercy not everyone who says "Lord, Lord," shall enter into the Kingdom of Heaven.

■ *Nulli Negabimus Justiciam*

In the last decade this nation has been treated to a series of sensational trials. Among the outstanding ones in our own country was the trial of the Nazi saboteurs during the hostilities of World War II. More recently we have witnessed the Coplon espionage case, the Alger Hiss trial, and the tedious and protracted trial of the Communists before Job-like Judge Medina. We have not yet embraced Star Chamber procedure.

This Anglo-American tradition was insisted upon by America's Chief Prosecutor, Mr. Justice Jackson, in formulating the procedure for the trial of the top Nazi criminals at Nuremberg. At the London Conference in 1945, Justice Jackson made it clear that he could not satisfy American legal opinion with any procedure in which there was not some attempt in good faith to give notice to a man that there were legal proceedings going on which affected him and gave him a chance in some manner to be represented and heard in open court. He also said: "The point is that the American people will not recognize as a trial a trial at which no evidence is produced in open court. There is no use of our going ahead with a trial that our people will not recognize as a fair trial." Here is an example of America's fundamental sense of justice assuring our due process of law to a conquered and helpless enemy.

In the trials of the Communist leaders in New York these past weeks there has again been demonstrated the vitality of our jury trial system. Beyond question it has been proved that the Communist organization within our nation is a foul conspiracy against our people's liberties and our Government. The real Communist will use every weapon of deceit, treachery, fraud and corruption to attain his goal. Yet despite this knowledge, we are giving to those whose affiliation with that organization seems self-evident every protection that our law accords a criminal defendant.

Why?

We are a nation which has fought and whose sons have died for the rights of freemen. In our veins runs the blood of the men who at Runnymede made a tyrant declare:

> To none will we sell, to none will we deny, or delay, right or justice.

Each defendant, however repulsive politically or morally he may be, shall only be condemned by the law of the land. In Webster's immortal words,

> A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society.

Here is our fundamental Anglo-Saxon sense of decency, of fair play, of justice. It is a fairness which is not weakness. It is a strength which is not brute force. It is a bit of the divine in man, enshrined in law, and an ideal to which, in God's good time, all men shall rally.

■ *Hands Off the Judges*

Judges are not sacrosanct. They are as answerable for their misconduct as any other members of our democracy. Erroneous rulings upon a trial, however, do not constitute misconduct for which a judge is personally answerable. Insofar as statements made on the floor of Congress criticising the conduct of United States District Judge Samuel H. Kaufman, in the trial of Alger Hiss in the Southern District of New York, were based upon his rulings at the trial, such statements are wholly at war with our institutions. There could be no more serious threat to the administration of justice in this country than the rise of a custom of personal attack by members of the legislature upon judges for interpretations of the law with which the legislators disagree.

■ *Human Rights and the International Court*

In this issue the JOURNAL publishes the address delivered by Judge Florence E. Allen before the Inter-American Bar Association last May. It is a lucid and interesting discussion of one of the basic issues before the world today. From the international events which Judge Allen presents, certain conclusions follow which support the thesis that an International Court of independent judges is the only means apart from war for the settlement of international conflicts and the only peaceful method of protecting human rights.

It is not the province of the JOURNAL to resolve the

problems of our day. It is the intent and purpose of the JOURNAL, however, to present the issues and afford opportunity to JOURNAL readers to consider the clearly presented arguments for and against the proposed solutions.

The Committee on Peace and Law Through United Nations, presided over formerly by Judge Ransom and more recently by Mr. Rix, has performed an excellent service in bringing to the attention of our profession and of our country the constitutional problems and national interests involved in the various proposals for the enforcement of human rights by international agencies.

Those problems cannot be evaded. Yet the fact remains that the only substitute for force in the settlement of ultimate disputes is third-party judgment. When conference, reference, arbitration and other methods fail, the only way to resolve a conflict is either by force or by reason. The only means ever devised for the operation of untrammeled reason on ultimate disputes is an independent court. As Judge Allen points out, the nation-states of the world have shown a woeful reluctance to invest an international court of law with authority to render final and enforceable judgment.

World conditions and modern methods of warfare now make this issue the most crucial that humanity has ever faced. If the nations insist upon maintaining their absolute sovereignty, final differences between them can be settled only by war. If, however, they will modify their sovereignty to the extent of subjecting it to the rule of law, then differences between them may be determined peacefully. Until this is done, as Judge Allen concludes, "we shall not begin to establish a juridical world order."

Editor to Readers

Canons of professional conduct are useful guides to the profession, but only to the extent to which they are observed. It is a fine thing for the American Bar Association and for other groups of lawyers to adopt and publish rules of conduct, but our satisfaction with our efforts obviously diminishes at least in proportion to the extent to which those rules are disregarded by those whom they are intended to guide. Apropos of this subject Loyd Wright, of Los Angeles, a member of our Advisory Board, has called our attention to the following communication of the Board of Trustees of the Los Angeles Bar Association which was printed in the July, 1949, issue of the *Los Angeles Bar Journal:*

> IT HAS come to the attention of the Board of Trustees of the Los Angeles Bar Association that with increasing frequency legal matters are referred by lawyers in other states to lawyers practicing in Los Angeles County under arrangements by which the so-called "forwarding attorney" asks for and is given one-third of the fee paid by the client for the services rendered. Conversely, local lawyers have been forwarding business to other cities under similar arrangements.
>
> There is no criticism of this practice when it is limited to instances in which the forwarder, to a degree sufficient to justify the division, shares in the services and responsibility and not solely in the fee.
>
> In other cases this Board considers the practice to be a clear violation of the Rules of Professional Conduct of the State Bar of California and the Canons of Ethics of the American Bar Association and other bar associations.
>
> Canon 34 of the American Bar Association Code reads:
>
> > No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.
>
> Rule 1 of the California Rules contains the following:
>
> > The specification in these rules of certain conduct as unprofessional is not to be interpreted as an approval of conduct not specifically mentioned. In that connection the Canons of Ethics of the American Bar Association are commended to the members of the State Bar.
>
> Opinion No. 153 of the American Bar Association Committee on Professional Ethics and Grievances, in which Canon 34 was applied, quotes with approval decisions of the Committee on Professional Ethics of the New York County Lawyers Association to this effect:
>
> > All division of compensation paid lawyers should be based upon the sharing of professional responsibility or service, and a division of fees merely, because of recommendation of another is not proper.
>
> Our investigation of a practice which has become too prevalent in this area indicates that the Rules of Conduct referred to above are violated in the following kinds of transactions:
>
> (a) A lawyer in another city introduces a client to a correspondent here or recommends the Los Angeles lawyer to the client. The Los Angeles lawyer performs all the services and the "forwarding attorney" does nothing.
>
> (b) The "forwarding attorney," with the approval of the client, refers a particular matter to the Los Angeles lawyer. The Los Angeles lawyer performs all of the services without further correspondence with or aid from the "forwarding attorney."
>
> (c) The client thereafter retains the Los Angeles lawyer for new matters in no way connected with the original employment. The "forwarding attorney" nevertheless shares in the fees paid for such later employment, even though he participates in no way in rendering services and in some cases does not even know that the matter has arisen.
>
> In the opinion of this Board of Trustees all of these lettered practices are unethical, in violation of established and accepted rules, and should be discontinued.
>
> This Board of Trustees has further found that in many, if not in most, instances in which fees have been divided, the fact that the division is made is not disclosed to the client. This is a violation of Canon 36 of the American Bar Association which reads:
>
> > A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.

* * * * *

Senator Herbert R. O'Conor, a member of the Senate Committee on the Judiciary, has made the following statement regarding the proposed bill to prevent Supreme Court Justices from appearing as character witnesses in court:

"The proposed legislation to prohibit Justices of the

Supreme Court from testifying as character witnesses in a criminal trial is, I consider, ill-advised and ill-timed.

"Such a law, if enacted, would be an improper interference with the Judiciary, and it is extremely doubtful if it would stand the test of constitutionality. The three branches of government are separate and distinct and must be kept so. Legislators are prompt to complain when one of the other coordinate branches takes a step which is considered to be trespassing on the rights of the Congress.

"Purposely I am not commenting upon any particular case. In fact, it would be presumptuous of me to do so. I have always found that a law which is passed to fit a given case is usually a misfit.

"As a general proposition we can leave it to the Courts to determine the rules which should guide their own actions.

"An excellent illustration is at hand of the way in which such court problems should be handled. Not long ago in Baltimore City the Judges of the Supreme Bench decided, purely as a matter of policy, without any binding rule, that the judges would not appear as character witnesses except, perhaps, in a situation that might involve a servant or employee or some similarly situated person.

"Of course, if the judges are summoned they must obey the summons, but they would make a statement to the Court of the policy of the Supreme Bench. No lawyer would want a judge to testify to his client's character with that kind of statement preceding the testimony. All character witnesses are consulted before being summoned. All a judge would have to do would be to say 'NO.' The matter would end there. . . .

* * * * *

On June 24, the Judiciary Committee of the House of Representatives reported favorably H.R. 4446, the proposed Administrative Practitioners Act, and recommended its passage. Subcommittee Chairman Francis E. Walter, who introduced the current bill, submitted a report, which is thus an official administrative law document of lasting interest and importance to the Bar. It is carried in the *Administrative Law Bulletin* for July 15, 1949, published by the Administrative Law Section of the American Bar Association.

Several years ago the American Bar Association authorized its Section of Administrative Law and its Committee on the Unauthorized Practice of the Law to collaborate with members of Congress in framing suitable legislation to regulate admissions to practice before federal administrative agencies and kindred matters. Extensive hearings were held before a subcommittee of the House of Representatives in 1947 and 1948.

While general professional agreement seems to have been reached respecting the terms of the proposed legislation, the administrative problem will be important if it passes. Whether the requisite informed and able personnel can be secured and maintained for the staffing of the proposed credentials committee will depend upon the time and effort which interested professional organizations give to the subject, particularly during the formative stages of the organization. In that connection the appointment of its full-time secretary will be of paramount importance. The five-member Committee is to be composed of four top government people and one "attorney engaged in the private practice of law representative of the legal profession". Such direct participation by the Bar is designed to assure the continuous and active interest of the organized profession. Lawyers will be interested in following the course of this legislation closely. Copies of the bill and reports may be secured by writing your Senators and Representatives.

* * * * *

In an unparalleled gesture of generosity and courtesy to the Bar of America the law book publishers, although hard pressed to fill their orders in due course, made contributions of the publications which went into the libraries presented by the Association to the legal professions in France and in Italy. The names of the publishers and the books furnished by them free of charge are as follows[1]:

American Law Book Company, *Corpus Juris Secundum;* American Law Institute Publishers, *American Law Institute Restatement;* Bureau of National Affairs, *The Copyright Law,* by Howell; *The New Trade Mark Manual,* by Robert; Bobbs-Merrill Company, *Treatise on Law of Torts,* Harper; Lawyers Co-Operative Publishing Company and Bancroft-Whitney Company, *American Jurisprudence* and *American Law Reports Annotated;* Little, Brown & Company; *International Law,* by Hyde; Martindale-Hubbell Law Directory, *Lawyers Directory;* Matthew Bender & Company, *Federal Income, Gift and Estate Taxation,* by Rabkin and Johnson; Edmund Morris Morgan, Jr., *Introduction to the Study of Law,* Morgan; Vernon Law Book Company, *Modern Legal Forms;* West Publishing Company, *U. S. Code Annotated, Federal Digest, Supreme Court Reporter, Black's Law Dictionary, History of Anglo-American Laws,* by Radin, *Legal Bibliography,* by Beardsley and Orman.

1. The libraries were accepted at the wharf in New York by the State Department and transported by it to the Embassies in Paris and Rome, respectively.

"Books for Lawyers"

RELIGION AND EDUCATION UNDER THE CONSTITUTION. *By James M. O'Neill. New York: Harper and Brothers. 1949. $4.00. Pages xii, 338.*

This is a book about a phrase: a book written to establish the meaning of the phrase. The phrase is "an establishment of religion": words taken from the First Amendment to the Constitution of the United States: words which became part of the basic instrument of our Federal Government in 1791, but which had never been authoritatively construed as to content by the United States Supreme Court until treated by way of dictum in 1947 in the case of *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 91 L. ed. 711, 67 S. Ct. 504, which dictum became the "boomerang" basis of decision in the following year in the case of *McCollum* v. *Board of Education*, 333 U.S. 203, 92 L. ed. 649, 68 S. Ct. 461.

The author, Dartmouth-educated and a life-long professor of rhetoric, oratory and speech at Dartmouth, Wisconsin, Michigan and currently at Brooklyn College, discloses that his recent experience for twelve years as a member of the Committee on Academic Freedom of the American Civil Liberties Union (during four of which years he was the Committee Chairman) made him aware of misunderstanding and confusion in regard to the purpose and effect of the Bill of Rights, and set him to the composition of this volume before either Supreme Court decision had been rendered. The decisions, therefore, were not the occasion for the book, but served merely to emphasize the widespread character of the misunderstanding and confusion which the author had noted, and to confirm his judgment that we must put an end to the false assumptions, slogans, myths and distortions of historical fact which presently plague the discussion of civil liberties, and particularly of those within the scope of the first clause of the First Amendment.

"The essential question . . . in all the current controversies in this area is simply the meaning of the phrase 'an establishment of religion' in the First Amendment. . . . My thesis is that the words 'establishment of religion' meant to Madison, Jefferson, the members of the First Congress, the historians, the legal scholars, and substantially all Americans who were at all familiar with the Constitution until very recent years, *a formal, legal union of a single church or religion with government, giving the one church or religion an exclusive position of power and favor over all other churches or denominations.*" (Italics are those of the author.) Hence, the essence of an establishment of religion is monopoly to one church or religion. The prohibition of an establishment of religion does not mean the complete separation of church and state, which is simply a modern slogan that is not and never has been a great American constitutional principle. Rather, the sole genuine, specific American constitutional principle is simply "no established church"; and, while this principle may be legitimately referred to as a type of separation of church and state in a Western world of universal union between one church and the government, yet, if so designated, the frame of reference must be kept ever in mind. The controversies of today in regard to the relationship of government to religion are primarily the result of the attempt to substitute the slogan for the specific language of the First Amendment, when the fact is that the slogan is in direct conflict with that language. Such is the author's principal theme.

The bulk of the book consists of the marshalling of historical evidence to demonstrate and support this definition of "an establishment of religion", and to rescue the phrase from the perversion to which the substituted slogan has subjected it. In the marshalling of the evidence lies the value of the book. The work won the highest compliments of Professor Edward S. Corwin, the eminent authority on American constitutional history. Professor O'Neill demonstrates that his definition of the phrase was (1) what the original states petitioned for; (2) what the language meant in the common vernacular of the eighteenth century, and (3) against the background of the times; (4) what Madison meant; (5) what Jefferson meant; (6) what the legislature of Virginia meant; (7) what all Federal Congresses have meant; (8) what all our Presidents have meant (including President Grant); (9) what all the several states have meant; (10) what historians and legal scholars have meant; (11) what the United States Supreme Court itself has meant up to 1947. When this barrage of evidence is aimed at the *McCollum* decision to expose it for the historical misinterpretation which it is, the effect, in the words of Professor Corwin, is "simply devastating".

It is unfortunate that the book has been written in a mood of irritation. Professor O'Neill is obviously out of patience with the United States Supreme Court for having succumbed to historical error. He is not persuaded that the ignorance of the Court is invincible; in fact, he is half-persuaded that that ignorance is not only vincible but studied. The references made by Mr. Justice Black

in the *Everson* decision show plainly that, in pronouncing the dictum, he had not considered the available historical materials as to the meaning of the phrase under construction; consequently, his abrupt dismissal of the historically enlightening argument for the defendants in the *McCollum* case by a mere repetition of the bare dictum lends color to the author's suspicion. Mr. Justice Rutledge, dissenting in the *Everson* case, baldly interprets the phrase to read "an establishment of religion, religious establishments, or establishments having a religious purpose whatever their form or special religious function"; *i.e.,* an establishment of religion is synonymous with a religious establishment, an equation which (says Professor O'Neill) is readily made by one who is unacquainted with eighteenth-century American history. The effort of the Justice to document this aberration represents very poor scholarship: his research is flagrantly incomplete, his reliance on Madison's *Remonstrance* involves a major unstated assumption, and he ignores the principles of constitutional construction enunciated both by Madison himself and by Jefferson. Mr. Justice Frankfurter, concurring in the *McCollum* case, presents a brilliant construction of the phrase "complete separation of church and state" without seeming to be aware that that phrase is not in the Constitution, a technicality which perhaps was intended to be obviated by the definition of the phrase which *is* in the Constitution as a "spacious concept"; the Justice then concludes by discovering in the Constitution another proposition which his own research reveals specifically to have been denied inclusion over and over again. Even Mr. Justice Reed, who gave us the salutary reminder that a rule of law ought not to be drawn from a figure of speech, is attracted to the idea that the phrase under consideration has somehow acquired a "broader meaning during the passing years". Mr. Justice Jackson sidestepped historical error in the *McCollum* case by wondering out loud how the case ever got before the Court for consideration. In short, the *McCollum* case "made" history in more ways than one; it will be the conundrum of the century in that one Justice does not know how the case got before the Court, and another does not know what made the particular plan unconstitutional and none of the others knows the answer to either of these questions.

These are the considerations which exasperate Professor O'Neill to the point where his own language is markedly intemperate. The decisions are "semantic and historical nonsense", "complete nonsense", "fantastic", "startling", "thoroughly specious". He is inclined to borrow Professor Corwin's question in another connection: "How far is a court entitled to indulge in bad history and bad logic without having its good faith challenged?" Professor O'Neill's own criticism is "not that the Justices have interpreted historical facts or phrases in a way that seems to me unjustified from the standpoint of either semantics or history, but that these Justices of the Supreme Court apparently do not know the most important facts of our constitutional history which have a bearing on the questions they are deciding. The only other possibility is that they do know the facts but either callously ignore them, or wilfully misrepresent them". The larger issue involved, in Professor O'Neill's view, is that the Court is amending the Federal Constitution in the guise of judicial construction, and that its willingness to do so is being deliberately exploited by those who know that they cannot procure the amendments they seek by the constitutionally authorized process of amendment. "Unless the American people stop the current trend, exemplified in the Supreme Court decision in the *McCollum* case, and force a return to the doctrines of democratic decision and of the Constitution as written and ratified by the American people, we shall drift inevitably into a regimented society under the unrestrained dictatorship of the men on the Supreme bench."

By way of contrast, the reader should note the objective, impersonal attitude of another scholar writing recently in the same field who, though equally disturbed by the same developments as have disturbed Professor O'Neill, yet retains his professional poise: Wilfrid Parsons, S. J., in *The First Freedom.* And for a well-rounded grasp of the entire field by including the story of the relations between religion and government in several of the original American states, the reader should consult a third book, of which both Professor O'Neill and Fr. Parsons seem equally unaware: *Religious Liberty in Transition,* by Dr. Joseph F. Thorning.

Since "an establishment of religion" historically means "the establishment of a religion", Professor O'Neill's book might well have been subtitled "An Essay on the Importance of the English Article". The entire language of the First Amendment relating to religion reads: "Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof". The more generic idea expressed in these words is that there shall be no federal laws which prohibit the free exercise of religion. Since the *type* of law which was then universal in the Western world and which *necessarily* prohibited the free exercise of religion, was a law establishing a given religion, that type of law was specifically singled out for attention. But since several states then had an established religion and several had not, it was feasible merely to provide that, whatever the situation might be in a given state, the *National* Government should never act either to establish or to disestablish a religion either in the nation or in any state, *i.e.,* should never enact *any* law respecting an establishment of religion. Thus the most notorious method by which the free exercise of religion had been traditionally interfered with was specifically proscribed by being placed beyond the competence of the National Government, and then the generic proscription of like type followed. The con-

cepts here involved are not correlatives; rather, the generic proscription was coupled with a specific proscription which was thought necessary because experience had demonstrated the likelihood of that type of interference. Every establishment of religion necessarily interferes with the free exercise of religion to some extent, but not every interference with the free exercise of religion takes the form of an establishment of religion. The aim was to prevent any interference by the national government with the free exercise of religion.

The testimony of Mr. Justice Story is that probably, when the Constitution and the First Amendment were adopted, "the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation". "The real object of the Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government." From this testimony *inter alia*, Professor O'Neill infers that the secondary aim of the religious language of the First Amendment was the equality of all free religions (because inequality would to that extent be nonfreedom).

The author then concludes that "the rights of conscience are of course endangered by established churches, but are never endangered by treating all religions equally in regard to support, or non-support, by a government that allows religious freedom". To treat all religions equally by nonsupport of any by a government which allows religious freedom is a principle long espoused by many Americans. To state that such treatment is *constitutional* is accurate; to state that such treatment represents the American tradition or constitutes a great American principle is inaccurate; to state that such treatment is advisable in the United States is to present the matter as the debatable proposition which it is. On the other hand, to treat all religions equally by support of all indiscriminately by a government which allows religious freedom is a principle long espoused by many other Americans, and a principle which has in fact been consistently practiced by our national and state governments. To state that such treatment is unconstitutional is inaccurate. This is the objectionable error made by the present opponents of state and federal aid to private education, and it is the gist of the historical misinterpretation of the First Amendment made by the United States Supreme Court in the dictum of the *Everson* decision and in the basis of the *McCollum* case in the following words: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which . . . aid all religions. . . ." The truth is that either treatment is equally constitutional, and that the consistent American practice has been the indiscriminate support of all rather than the non-support of any.

We have a choice of two methods of treatment of all religions by a government which allows religious freedom. Both methods are equally constitutional. The method of indiscriminate support of all represents the American tradition, which is now sought to be extended to the field of incidental services to private education. To brand that method as unconstitutional is to befog the issue. The issue is *not* the constitutionality of either method, but the wisdom of choice of one or the other in the light of current educational necessities in the United States. The choice is a free choice which should be made, after full debate on the merits, in accord with the best interests of the nation. To foreclose such debate on the merits by stigmatizing one method as unconstitutional is a herring of the rankest odor.

Logically, there is but one process of reasoning by which the indiscriminate support of all religions may be branded as unconstitutional. Such support, obviously, does not constitute "an establishment of religion"; rather, "an establishment of religion" and the indiscriminate support of all religions constitute a contradiction in terms. But could such support constitute a prohibition of the "free exercise of religion"? It could if, but only if, we indulge yet another contradiction in terms by extending the term "religion" to include atheism and agnosticism. Such an extension has certainly been indulged in the United States in this sense: all concur that, under this language, no atheist or agnostic may be compelled by government to profess a belief which he does not entertain, nor may he be punished or discriminated against as a citizen because he does not entertain such a belief. Hence, the "free exercise of religion", which originally meant the freedom publicly to profess in the manner of one's persuasion a belief in man's creation by and consequent dependence upon God, has been extended to include the free nonexercise of religion, *i.e.*, the freedom to refuse to profess any belief in such dependence or such creation or such Creator, or affirmatively and publicly to profess a disbelief in such things. The abbreviation "freedom of religion" for the full and accurate phrase "free exercise of religion" has made the transition to "freedom from religion" almost imperceptible —until we are suddenly confronted with the *logically* valid conclusion that "freedom from religion" makes it unconstitutional to tax an atheist or an agnostic to procure public funds for the governmental support of all religions indiscriminately. Mr. Justice Frankfurter then caps the climax by announcing that the American ideal is and always has been to have a "state without

religion", a revelation which would be news indeed to Mr. Justice Story. A state without *a* religion (*i.e.*, without an established religion) is one thing; a state without "religion" is quite another. It can scarcely have escaped Mr. Justice Frankfurter that the late unlamented, as well as the current detested, examples of a state without religion bear little resemblance to these United States—a circumstance for which those of us who do profess a belief are entitled to add "Thank God!" The leading letter in the Association's JOURNAL for May last (35 A.B.A.J. 437) by William J. Butler of New York is an arresting and encouraging sign that Americans are beginning to examine the slogans in this area with penetrating insight.

A concluding reference should be made to another "slogan" which is bound to cause trouble. Professor O'Neill makes the incontestable point that in 1791 nobody intended the First Amendment to restrain any *state* government; he then criticizes some of the Justices who, in the light of the Fourteenth Amendment, loosely said that such was the intent of the First. The difficulty lies in the short-hand expression that the Fourteenth includes the First (if not all the first eight, a proposition on which the Court held a dress rehearsal in *Adamson* v. *California*, 332 U. S. 46, 91 L. ed. 1903, 67 S. Ct. 1672). More accurately stated, the proposition is that the restraints imposed by the First Amendment upon the Federal Government have been extended by analogy to all state governments by a broad construction of the "due process" restraint of the Fourteenth Amendment. Professor O'Neill cannot see how the phrase "due process of law" can be used as a "carrier clause" to transfer the federal disabilities of the First Amendment to all the states. The better rationale would seem to be that the freedoms specified in the First Amendment are guaranteed against *state* interference by the Due Process Clause of the Fourteenth Amendment, *not* because they are guaranteed against *federal* infringement by the First, but simply because they are fundamental personal rights and liberties "implicit in the concept of ordered liberty" and therefore inherent in due process. The Supreme Court of Michigan, for example, in the case of *People* v. *Simon*, 36 N.W. (2d) 734, recently advanced the interesting conclusion that "at no time has a majority of the United States Supreme Court subscribed to the theory that the Fourteenth Amendment makes any of the first eight Amendments applicable to the States, although the subject matter of some of them may relate to human rights and liberties so fundamental as to be inherent in the due process guaranteed by the Fourteenth Amendment".

Professor O'Neill would wish the reader to note that the extension of the subjects to which a restraint applies cannot involve any extension of the nature of the restraint itself: the restraint herein involved is still merely that a government shall keep its "Hands Off" in the matter of the establishment or disestablishment of a religion. For his research and his marshalling of the historical evidence to establish this accurate meaning of the phrase "an establishment of religion," we are all indebted to Professor O'Neill.

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LAW AND TACTICS IN JURY TRIALS. *By Francis X. Busch. Indianapolis: The Bobbs-Merrill Company, Inc. 1949. $17.50. Pages xxvii, 1147.*

When a veteran of the Bar disgorges his secrets and discloses his own time-tested trial tactics, the reading audience gathers, because as the author of the present volume well states in his preface:

> In no branch of the law does actual experience play as great a part as in the development of a trial lawyer.

Therefore, the priceless ingredient of any book on trial tactics is the skill and experience of the author. The author of the present work is a well-known Chicago lawyer who has had a wealth of experience. Born in Detroit, Michigan, in 1879, he came to Chicago before the turn of the century and was a shorthand reporter in the trial courts of Chicago and Cook County while studying law. Admitted to the Illinois Bar in 1901, he has practiced law actively and successfully for now nearly a half century. He has held offices including those of master in chancery, attorney for the board of election commissioners and corporation counsel (head of the law department) of the City of Chicago. Concurrently with these activities, the author was Professor of Law and later Dean of DePaul University Law School, Chicago. He is now Dean Emeritus.

From such an author, one would expect a book of unusual merit and the present volume lives up to this high expectation. The history of jury trials, the law pertaining to the composition of juries, the rules of evidence and the law applicable to all the successive steps in a jury trial are set forth in this book in sufficient detail to furnish the practitioner with citable authorities on a great number of propositions arising in a jury trial. In solid content of this nature, the volume is as comprehensive as could possibly be expected of a one-volume work on such an extensive subject.

While valuable and well done, this portion of the book could, after all, have been written by a studious lawyer who was not necessarily skilled in the art of advocacy. Where the book excels is in those portions which come from the author's wide experience. Not only has Mr. Busch given his reader the full benefit of his own ripe experience, but he has done a prodigious job of assembling material from many sources, much of it hitherto unpublished. Two printed pages are devoted to acknowledging the author's indebtedness to the sources of such material. The widely diversified types of material which Mr. Busch has brought together in one book for purposes of illustrating his points are reminiscent of the genius of the late John H. Wigmore, to whom, appropriately

enough, Mr. Busch attributes the suggestion that the author undertake the preparation of this book.

Fortunately for those whose chief interest in this book will be in extracting the golden nuggets from the author's own experience, the section headings and the division of chapters into "parts" and other mechanical aids clearly indicate what portions of the book contain rules of law and what portions contain the teachings and comments of experience. Furthermore, the value of the large amount of illustrative material that the author uses is greatly enhanced by his comments that follow the illustrations and are plainly labeled "Comment". Catch lines and subheads are used generously throughout the text and greatly assist the reader in grasping the sequence and arrangement of widely divergent materials. The illustrative material and the author's main text are well cross-referenced. The boldness of the figures indicating footnotes provides an easy transition from text to footnote. The footnotes, while copious, are not simply additional portions of the main text placed in the footnotes to give an appearance of great learning. The book does adhere to the annoying practice of separating the name of a cited case in the text from the citation of the case in the footnote but this is probably not the fault of the author. Except for this minor annoyance (which disregards the fact that the name of a case which needs any citation at all is meaningless unless the citation accompanies the name of the case), the footnotes are useful aids to a reading of the main text and not impediments to a rapid and clear understanding of the text which latter is too often the case.

The scope of the practical suggestions which the author gives is just as broad as the wide subject-matter of the book itself. The examination of jurors on *voir dire*, the opening statement, the presentation of evidence both oral and documentary, the sequence of witnesses, cross-examination of witnesses, the form of legal objections made in the presence of the jury, and the oral argument (to mention a few) are all treated by Mr. Busch with, figuratively, one eye on the jury. The running subtitle appearing on the left hand pages throughout the book is "The Art of Jury Persuasion" and, truly, the author points everything to the accomplishment of that object.

Where on a point under discussion there are two schools of thought among trial lawyers, the author states both and gives his preference with his reasons and usually with illustrations proving his choice to be preferable.

Many "things not learned from books", of which younger lawyers so often hear, are now obtainable in this volume. The author is entitled to the thanks of this and future generations of lawyers for having undertaken and brought to a successful completion this comprehensive work on such an important subject. This book will not take the place of experience, but it will be of great assistance to the many lawyers who have less experience than the author and it will certainly lead experienced trial lawyers to reappraise their own trial tactics in the light shed by this author.

OWEN RALL

Chicago, Illinois

UNDERSTANDING THE CONSTITUTION. *By Edward S. Corwin and Jack W. Peltason. New York: William Sloane Associates, Inc. 1949. Price $1.35. Pages 147.*

This book was written neither by lawyers nor for lawyers. It was written by two eminent professors "for the beginning student and the layman". The authors' description of their method is: "Each Article of the Constitution is taken up section by section and explained, amplified, and interpreted in non-technical terms."

There is need for such a volume. Ours is a complicated system of government which requires much explaining. The desiderata of such a study are accuracy, objectivity, selectivity and brevity. This book has the defects of its qualities, because in achieving some of these objectives it has sacrificed others. It is brief, but its brevity deprives it of comprehensiveness, of balance and, in some instances, of accuracy.

Obviously no description of the Constitution can even approach adequacy unless it includes the major interpretations of the Supreme Court. The maximum of brevity could have been attained by following a declared plan of merely stating the current constructions of the Constitution without referring to any changes of interpretation and without either approving or disapproving the prevailing constructions. Another plan, which would have resulted in a more elaborate book, would have been in each instance where a construction was given, to have made some reference to whether the Court had been consistent in its view, and to have commented freely upon conflicting interpretations. A third plan—midway between the other two—would have been to state in the foreword that the current constructions were given, and to add a supplementary chapter in which changes were catalogued and perhaps criticisms added.

The authors have followed no one of these plans. They have given the current constructions of the Constitution. They have mentioned some changes of view by the Supreme Court, have neglected others more important, and have thus left the impression that the views which are merely stated have been adhered to from the beginning. There is no allusion to the reversal of the earlier cases under which the admiralty jurisdiction was limited to the ebb and flow of the tide.[1] Legal tender is discussed but there is silence as to the about-face of the Court. No mention is made of the jettisoning of the federal common law by *Erie Railroad Co.* v. *Tompkins*.[2] In dealing with the Commerce Clause the suggestion is that there was merely a

1. *The Genesee Chief*, 12 How. 443 (U.S. 1851), overruling *The Thomas Jefferson*, 10 Wheat. 428 (U.S. 1825).

2. 304 U.S. 64 (1938).

gradual expansion of this provision for there is no intimation that there was an entire change of front by the Court.

Some of the discussions are so limited as to be misleading. There is an extensive comment upon procedural and substantive due process and the use by the Court of the due process provision to invalidate legislation; there is, however, no reference to the fact that the word "person" in the Fourteenth Amendment has been held to entitle corporations to the protection of this clause or to the attack now being made on this concept. There is an extended exegesis of the road the Court traveled to its holdings that some parts of the Bill of Rights have become effective against the states by virtue of the Fourteenth Amendment. In this connection it is stated that four members[3] of the Court have expressed the view that the entire first eight amendments have been incorporated against the states by the Fourteenth Amendment. However, we are not told that of these four, two have insisted that the Fourteenth Amendment not only incorporates all of these eight amendments but may also guarantee certain other undefined fundamental rights.[4] It is clearly pointed out that the Fourteenth Amendment prohibits only state action and the restrictive covenant cases are accurately digested;[5] there is, however, no statement that the argument against the constitutionality of a federal anti-lynching act is that mob murder is not state action.

There is for a succinct study of this type disproportionate editorializing. This is compressed—indeed so compressed as occasionally to seem dogmatic. Among the subjects discussed are the prerogative of the President in foreign affairs, the President's power of removal,[6] the injustice of not permitting residents of "the District" to vote in local elections, the use of executive agreements and of concurrent resolutions. These are all subjects worthy of comment. In each instance I personally agree with the comment. There are, however, many other similar topics equally or more important for discussion. To include some and exclude others results in imbalance of emphasis. There are here only two practicable courses—entirely to refrain from editorializing or to express opinions upon all debatable questions. The latter would so expand a volume of this type as to impair its usefulness. There is, however, no reason why the first should not have been followed.

Perhaps there may be some defense against the criticisms I have offered. There can be none for the positive errors. The federal courts of appeals are referred to by their former title—"circuit courts of appeals".[7]

Many—including not a few lawyers—continue to be puzzled when they wander and wonder in the federal field of domestic relations where, according to Mr. Justice Jackson, "confusion now hath made his masterpiece."[8] Probably the authors would have been wiser not to attempt to tread this labyrinth. However, in a chapter devoted to the Full Faith and Credit Clause, they write:

> Suppose again that X, a North Carolinian, goes to Nevada and obtains a divorce after a few weeks' sojourn there—are other states obliged to honor the divorce? In 1945 the Supreme Court said, no, because the Nevada court "lacked jurisdiction" of the case, X not being a bona fide resident of the state. But in June, 1948, this decision was practically canceled by another which says that state courts are final judges of their own jurisdiction in such cases. Thus was the green light given to easy divorce.

The supporting citations are of *Williams* v. *North Carolina*[9] and *Sherrer* v. *Sherrer*.[10] The quoted statement is not accurate. *Sherrer* v. *Sherrer* did not in any way modify *Williams* v. *North Carolina*. In *Williams* v. *North Carolina* the Court held that when an *ex parte* divorce was granted in Nevada the jurisdiction of the court to grant the divorce could be attacked in another state. In *Sherrer* v. *Sherrer* the Court held that when both parties appeared in a Nevada court and the question of jurisdiction was there litigated and the Nevada court held that it had jurisdiction, this was conclusive in every other state as to the marital status of the parties.[11]

The most egregious error is the attempt to state when direct appeals to the Supreme Court of the United States are allowable. The first instance cited is that any litigant whose claimed interpretation of the Constitution, of a federal law or of a treaty is rejected by a state court of last resort, has a right to a review by the Supreme Court. The example given is that a Negro convicted by a jury from which Negroes are excluded "has a *right* to a review by the Supreme Court". Not only is the general statement erroneous but the case posited is one where there is a claimed privilege or immunity under the Federal Constitution and for which there is express statutory provision—not for appeal but for an application for *certiorari*.

It is accurately stated that there may be a direct appeal from a decision of a court of appeals (incorrectly titled "circuit court of appeals") holding unconstitutional any state statute. It is erroneously declared that there may be a direct

3. Justices Black, Douglas, Rutledge and Murphy.

4. Justices Rutledge and Murphy.

5. See *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), reversing 355 Mo. 814; *Hurd* v. *Hodge*, 334 U.S. 24 (1948), reversing 82 App. D.C. 180, 162 F. (2d) 233.

6. Curiously enough the authors fail to mention in this connection that one of the charges in the impeachment of Andrew Johnson was that he had violated the Tenure of Office Act by his removal of Edwin M. Stanton as Secretary of War, and that he was vindicated by the Supreme Court in *Myers* v. *United States*, 272 U.S. 52 (1926).

7. Title 28, *U.S. Code*, Judiciary, Sec. 43, effective Sept. 1, 1948.

8. *Rice* v. *Rice*, 336 U.S. 674 (April 18, 1949).

9. 325 U.S. 226 (1945).

10. 334 U.S. 343 (1948).

11. The impression is also left that under the Full Faith and Credit Clause a judgment obtained in one state is enforceable in another (presumably by execution from the first state) without the necessity of a suit on the judgment. The statement is: "This clause applies especially to judicial decisions. Suppose a Pennsylvania court awards X a $5,000 judgment against Y, also a Pennsylvanian; but then, after moving to New York, Y refuses to pay up. Thanks to the full faith and credit clause, X does not have to start a new suit against Y in New York. The New York courts will give full faith and credit to the Pennsylvania judgment and will enforce it just as they would a similar judgment of the New York Courts." (page 67). Perhaps this should and could, by congressional action, be made true. This, however, has not yet happened, and is not likely to happen in the foreseeable future.

appeal from the final decision of any anti-trust case. There is no clear or adequate statement that under defined circumstances there may be a direct appeal from any federal court or state court of last resort which holds unconstitutional any act of Congress. There is no mention of the provision that when a state court of last resort upholds a state statute challenged as being repugnant to the Constitution, treaties or laws of the United States, there may be a direct appeal. There is silence about the singular statutory provision that there may be a direct appeal from the action of a three-judge district court in granting or denying an injunction.[12]

Professors Corwin and Peltason had a unique opportunity to render a public service; their plan as they outline it is admirable. Professor Corwin has demonstrated that he is a profound student of our system of government. Moreover, he has proved by his frequent contributions to the daily press that he is a skilled popularizer. He and his coadjutor were capable of providing a work worthy of commendation rather than criticism. If they are well advised they will do this in another edition.

P.S.—After writing so much of this review I asked one of my partners to read it. He did so, and suggested that before releasing it I reread Professor Corwin's *The Constitution and What It Means Today*. I accepted the suggestion and reread the eighth edition[13] of that work. The method is the same as that of the present volume. Professor Corwin expresses in the preface to it his appreciation of the "invaluable assistance" of Professor Peltason and another "in compiling the Table of Cases and the Index." I find that the earlier book is subject to none of the criticisms I have made of the present volume. The current constructions of the Constitution are given, and there is a discussion of practically all the major instances in which the Court has changed its view. All of this is admirably accomplished in two hundred and thirteen pages. Moreover, there are no inaccuracies. Almost inevitably the conclusion is that the present work is a not too well-done abridgment of the earlier volume. The suggestion that when a new book is published an old one should be reread here has a novel application.[14]

WALTER P. ARMSTRONG
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A HISTORY OF THE SUPREME COURT OF GEORGIA, *A Centennial Volume. Prepared and Published under Direction of the Georgia Bar Association. Macon, Georgia: J. W. Burke Co. 1948. $5.00. Pages 292.*

This work, though it has been given "a local habitation and a name," is of more than local importance. It is a "must" book in the library of every Georgia lawyer, but lawyers everywhere will find it highly entertaining. Historians now, and more importantly in days to come, will study its pages, make use of its bibliographies, and find the explanation of many things which have made Georgia and its people unique.

Though Georgia was one of the original Thirteen States, it had no Supreme Court for more than half a century; indeed, in its early Constitutions, it forbade the grant of a new trial or the review of any case except in the Superior Court in the county in which the case originated. The reasons for this provision in its organic law are interesting. Every attempt to modify it met with resistance: first, and openly, on the ground that the population of the state was sparse and widely scattered over a broad area; and the people were poor. (Even after Georgia ceded to the United States its territory between the Chattahoochee and the Mississippi Rivers, from which the States of Alabama and Mississippi were formed, it was still the largest state in area east of the Mississippi River) and it was argued that the

12. The paragraph dealing with direct appeals to the Supreme Court reads:

> The Supreme Court must, however, review the following types of cases when asked to do so by a disappointed litigant:
>
> A. When the highest state court competent to hear a case in which it is necessary to interpret the Constitution, a federal law, or a federal treaty *rejects* a litigant's interpretation of any of these, the Supreme Court must accept the case. For example, if X, a Negro, is convicted by State Y for murder by a jury from which Negroes were excluded, he could invoke the Fourteenth Amendment. If the highest state court competent to review the case rejects X's interpretation of this Amendment, he has a *right* to a review by the Supreme Court.
>
> B. When a federal circuit court of appeals strikes down a state law or action as repugnant to the Constitution, a federal law, or a federal treaty, the Supreme Court must review the case if it is brought before it.
>
> C. When a federal district court holds a federal penal statute unconstitutional, enjoins enforcement of a state or federal statute, or decides a case under the antitrust laws, the disappointed litigant may carry the case directly to the Supreme Court and the Court must review the case. (page 62)

The authors make it unmistakable that they are discussing direct appeals as distinguished from petitions for *certiorari* by adding: "With the exception of these cases the Supreme Court has discretion as to whether or not it will review a case. It accepts, 'on writ of certiorari', only those which it considers to be of sufficient public importance to merit its attention." (pages 62-63).

The authors' "A" is affirmatively erroneous, especially when considered in the light of the suppositious case. This is a claim of a privilege or immunity under the Federal Constitution. It does not fall within any of the described categories permitting a direct appeal. Moreover, a review by *certiorari* is expressly provided for. Tit. 28, U. S. C. A., c. 81, §1257 (3).

"B" is accurate so far as it goes, but it does not go far enough. There is a direct appeal to the Supreme Court not only from a court of appeals but from any federal court or any state court of last resort that "strikes down . . . a Federal law or Federal treaty." Tit. 28, U. S. C. A., c. 81, §§ 1252-1254.

"C" is accurate only if charitably interpreted—or misinterpreted. There is a direct appeal to the Supreme Court when a federal district court (or any other federal court) holds a federal "penal" (criminal) statute unconstitutional. There is also a direct appeal when a defendant is ordered discharged as a result of the questioned construction of a federal criminal statute. Whether or not an injunction is granted or withheld is not determinative of the right to appeal except in cases required to be tried by a "three-judge court." Tit. 18, U. S. C. A. (Criminal Code), c. 235, § 3731. Tit. 28, U. S. C. A., c. 81, §§ 1252-1254.

Anti-trust cases can be appealed directly to the Supreme Court only when the United States is the plaintiff and the Attorney General certifies the necessity for an "expediting" court of three judges. Tit. 15, U. S. C. A., c. 1, §§ 28-29.

13. This book has run through nine editions, the last of which was reviewed in 33 A. B. A. J. 263; March, 1947. The review is unsigned, and was probably written by the late William L. Ransom. *The Constitution and What It Means Today*. By Edward S. Corwin. (Ninth Edition, Completely Revised). Princeton, N. J.: Princeton University Press, 1947.

14. *Editorial Note:* It is, of course, not the function of the *Journal* to "police" books about law written by laymen for laymen. By sending this volume to us for review the publisher asked our opinion of it. We referred it to Mr. Armstrong, an independent reviewer, who has written favorably of other of Professor Corwin's books. This, as do our other reviews, expresses the individual opinion of the reviewer. That this may be clear is one reason why we prefer signed reviews.

expense of an appeal to a supreme court would prevent the poor from presenting their cases there and would make it a rich man's court; and, while not so publicly expressed, there was a strong prejudice against the very name "Supreme Court". This arose from the fact that about the turn of the century, one Chisholm, of South Carolina, filed in the Supreme Court of the United States an action against the State of Georgia. In answer to the summons, Georgia appeared only to remonstrate that she was a sovereign and not subject to the citation. The Court overruled the remonstrance and took jurisdiction (*Chisholm* v. *Georgia,* 2 Dallas 840.) The cherished doctrine of states' rights had been challenged by a monster called the "Supreme Court". Georgia got busy, took it up with the other states, and in 1804 the Eleventh Amendment to the United States Constitution was adopted and the Court had to abandon the jurisdiction it had asserted.

The Eleventh Amendment dealt only with original jurisdiction, but Georgia also denied the appellate jurisdiction of the Supreme Court in actions in the state courts. (See the extended discussion, with historical data, contained in *Paddleford* v. *Savannah,* 14 Ga. 438) A Georgia governor defied the Supreme Court of the United States, ignored its processes, and ordered the sheriff to hang men when appeals from the judgment of the state court were pending in the United States Supreme Court. Other governors followed this precedent. (President Jackson, it will be recalled, refused to aid the federal court against Georgia's defiance of it.) The General Assembly enacted drastic statutes for the punishment of any one seeking to enforce or aiding in the enforcement of any such judgment of the Federal Supreme Court.

For years politicians capitalized upon these prejudices. However, in 1835, by which time the conflicts of legal opinions among the various superior courts had become intolerable, the General Assembly, by affirmative vote at two consecutive sessions, adopted an amendment to the Constitution, as it had the right to do at that time, authorizing the creation of a Supreme Court of Georgia. It was not self-executing and the enabling act was not passed until 1845. The provision was for a peripatetic court, travelling about the state, going to the people instead of requiring the people to come to it, with nine cities and towns designated at which the court should meet at least once a year.

Fortunately the three first judges were great lawyers of highest personal character and dignity—Joseph Henry Lumpkin, Hiram Warner and Eugenius A. Nesbett. It was touching as well as ludicrous to see these learned men riding in two-wheeled sulkies cross-country, over "stick-and-dirt" roads, to keep their engagements to hold the courts in various parts of the state. By the very force of their character they won favor for a court which had been created with misgivings and over strong opposition.

The most persuasive argument on which the court was created, namely, that in a few years the Supreme Court could settle all the conflicts in the decisions of the superior court judges in the various parts of the state and all doubtful questions of law could soon be finally settled, and the court thereupon could be abolished, has not yet come into effect. Indeed, the Court has not yet got around to settling all the conflicts in its own opinions.

Georgia has what is probably the most rigid rule of *stare decisis* in the country. In 1858, the General Assembly adopted a statute, the significant features of which are now a part of our Code and which provide in substance that a unanimous full-bench decision of the Supreme Court shall not be reversed, overruled or modified except by the unanimous vote of all the Justices, after special reargument of the point; and until it is so modified such a decision shall have all the force and effect of legislative enactment. A well established corollary to this rule is that, as between two conflicting full-bench decisions, the older, unless overruled or modified in the manner provided for in the statute, prevails.

As 1945, the hundredth anniversary of the birth of the Court, approached, the Georgia Bar Association took notice of it, and not only arranged for appropriate exercises in the Court itself, but divided the hundred years of the Court's existence into eight periods of approximately twelve years each, and assigned the preparation of the history of the Court for each of these periods to an outstanding member of the bar. *Seriatim,* beginning in 1944, these historical sketches have appeared in the *Georgia Bar Journal.* These articles, along with an introduction by that brilliant young lawyer and writer, Alex A. Lawrence, of Savannah, the present President of the Georgia Bar Association, and an historical sketch of things leading up to the creation of the Court, by Judge Bond Almand, of Atlanta, recently appointed to a justiceship on the Supreme bench, have been edited and arranged by John B. Harris and his assistant, Mrs. Grant Williams, the editors of the *Georgia Bar Journal,* into a convenient volume published under the sponsorship of the Georgia Bar Association.

In this review, only a few of the interesting things the work deals with have been noticed. The whole volume is full of human interest. Its patent lack is the lack of an index.

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Review of Recent Supreme Court Decisions

ALIENS

Immigration Act Requires Independent Examination by Medical Appeal Board of Immigration Service as Basis for Refusal To Admit Alien Allegedly Mentally Defective

■ *United States* ex rel. *Johnson* v. *Shaughnessy*, 336 U. S. 806, 93 L. ed. Adv. Ops. 849, 69 S. Ct. 921, 17 U. S. Law Week 4387. (No. 506, decided May 9, 1949.)

Johnson, a native of Sweden, was denied admission to this country as an immigrant by the Immigration and Naturalization Service on the ground that she was a mental defective. She began a *habeas corpus* proceeding in the District Court contending that she was not mentally defective, and challenging the legality of the exclusion order. The District Court discharged the writ, and remanded Johnson to the custody of the immigration authorities. The Court of Appeals for the Second Circuit affirmed, one judge dissenting.

Mr. Justice BLACK wrote the opinion of the Court reversing. He affirms the holding of the Court of Appeals that the board of special inquiry of the Naturalization Service was bound to accept as final the medical certificate of the medical appeal board. However, he notes that the medical appeal board's conclusions were based on the initial certificate of two Public Health doctors and upon a report made by the physician of the ship on which Johnson traveled to this country. This does not meet the statutory requirement of an independent review and re-examination by the medical appeal board, he says, and the cause is reversed and remanded.

Mr. Justice REED, joined by the CHIEF JUSTICE and Mr. Justice BURTON, dissented, saying that he disagrees with the Court's interpretation of the medical report, and that the point upon which the Court rests its decision had never been raised by either side. Y.

The case was argued by Gunther Jacobson for Johnson, and by Patricia H. Collins for Shaughnessy.

APPEAL

Supreme Court Denies Stay of Execution of Order of District Court Although Appeal Pending in Court of Appeals and Although Effect of Denial Is To Render Appeal to Court of Appeals Nugatory

■ *In the Matter of Electric Power and Light Company*, 337 U. S. 903, 93 L. ed. Adv. Ops. 894, 69 S. Ct. 917. (No. 610, announced May 16, 1949.)

The SEC devised a plan of dissolution of the Electric Power and Light Company. The District Court found it "fair and equitable" and ordered its enforcement. Petitioners moved for a stay of execution of the plan. This the District Court denied. They appealed to the Court of Appeals for the Second Circuit. It is conceded that the appeal would be nugatory if the plan were executed before disposition by the Court of Appeals.

The Supreme Court denied the motion for a stay of execution.

In a dissenting memorandum, in which Mr. Justice MURPHY joined, Mr. Justice FRANKFURTER declared that the propriety of granting the stay turned on the merit or lack of merit of the appeal. That should be decided by the Court of Appeals and not in the Supreme Court. Since the Court of Appeals is continuing to entertain the appeal made to it, the right of appeal granted by Congress should not be rendered wholly ineffectual by refusal to grant a stay order, he says. Y.

APPEAL

In Homicide Case Arising in District of Columbia, Admissibility of Evidence of Threat Uncommunicated to Defendant Is Question for the Court of Appeals for the District, Not the Supreme Court

■ *Griffin* v. *United States*, 336 U. S. 704, 93 L. ed. Adv. Ops. 785, 69 S. Ct. 814, 17 U. S. Law Week 4370. (No. 417, decided April 25, 1949.)

Griffin was indicted for murder in the District Court for the District of Columbia. He pleaded self-defense when the deceased ran at him with his hand in his pocket. He was convicted. Shortly before the date set for his execution, he began these proceedings for a new trial, basing his motion on affidavits of his counsel to the effect that an open penknife had been found in the pocket of the murdered man, that the prosecution knew of this at the time of trial but had not introduced it in evidence nor made it available to the defense. The Government justified this on the ground that evidence of the knife was inadmissible, since knowledge of its possession by the deceased was not communicated to the defendant at the time of the alleged murder. The District Court agreed, and the Court of Appeals for the District affirmed.

Mr. Justice FRANKFURTER wrote the opinion of the Court affirming the stand of the courts below. He declares that there is no federal rule as to admissibility of evidence of uncommunicated threats to defendant, that even if there were it would not necessarily be applicable to the District of Columbia and that courts are split on the question. The problem is serious, he says, and was not explored in the courts below. He declares that it has become settled policy of the Court, absent congressional statute, "to recognize that the

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formulation of rules of evidence for the District of Columbia is a matter purely of local law to be determined . . . by the highest appellate court for the District". The case was therefore remanded to the Court of Appeals.

Mr. Justice MURPHY, joined by the CHIEF JUSTICE, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE, dissented, saying that the evidence was clearly admissible on the ground that a defendant should be able to present to the jury evidence lending credence to his theory of the case. He characterizes the holding of the majority as one that no District of Columbia rules of evidence are reviewable by the Supreme Court and expresses his disagreement.

Y.

The case was argued by Francis J. Kelly for Griffin, and by Charles B. Murray for the United States.

ARMY AND NAVY

Failure To Conduct Pre-Trial Investigation Required by Seventieth Article of War Does Not Deprive Court Martial of Jurisdiction

■ *Humphrey* v. *Smith,* 336 U. S. 695, 93 L. ed. Adv. Ops. 774, 69 S. Ct. 830, 17 U. S. Law Week 4380. (No. 457, decided April 25, 1949.)

A court martial convicted Smith, an American soldier, of rape and assault with intent to commit rape. He brought *habeas corpus* proceedings in the District Court, asserting that his conviction was void because the pretrial investigation provided for by the Seventieth Article of War was neither "thorough" nor "impartial" as that Article requires. The District Court refused to grant *habeas corpus.* The Court of Appeals reversed and ordered his release.

Speaking for the Court, Mr. Justice BLACK reversed the Court of Appeals and denied relief. He declares that there was no finding of unfairness in the court martial itself, and says that the pretrial investigation is not "an indispensable prerequisite to exercise of the Army general court-martial jurisdiction". Nothing in the legislative history of the Article shows that Congress intended otherwise, he notes, and although the Judge Advocate General once so ruled, that ruling has been repudiated in later holdings by him.

A dissenting opinion written by Mr. Justice MURPHY, joined by Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE, would strike down the conviction, relying upon the language of the Article ("No charge will be referred" without an investigation), and two decisions of the Army's Board of Review handed down shortly after the Article became law.

Y.

The case was argued by Robert W. Ginnane for Humphrey, and by Daniel F. Mathews for Smith.

COMMERCE

California Statute Having Substantially Same Provisions as Federal Motor Carrier Act Is Valid Where Federal Act is Silent on Subject of Excluding State Action and Legislative History is Lacking

■ *California* v. *Zook,* 336 U. S. 725, 93 L. ed. Adv. Ops. 796, 69 S. Ct. 841, 17 U. S. Law Week 4351. (No. 355, decided April 25, 1949.

Zook was convicted of violation of a California statute forbidding sale or arrangement of any transportation over the public highways of the state if the transporting carrier has no permit from the Interstate Commerce Commission. The Federal Motor Carrier Act has substantially the same provisions. Zook contended that the California statute was invalid on the ground that it entered an exclusive federal domain. This contention was overruled by the trial judge, and the state appellate court reversed.

Speaking for the majority of the Court, Mr. Justice MURPHY upheld the validity of the state act. He notes that the federal statute is silent upon the point of excluding state action in the same field, and that there is no legislative history to assist in determining congressional intent. However, as there is no conflict in terms between the two statutes, and no possibility of conflict, he concludes that the California statute is valid, rejecting Zook's "coincidence means invalidity" theory.

Mr. Justice BURTON, with whom Mr. Justice DOUGLAS and Mr. Justice JACKSON joined, wrote a long dissenting opinion, noting that different penalties were provided by the two acts, the federal act providing fines only, whilst the state act prescribed imprisonment for the second offense. He declares that the Court should be reluctant to find congressional intent to share jurisdiction with the states, absent an express provision. He then makes a step by step analysis of the history of the California and federal regulation of the problem, pointing out that the original California statute recited the necessity for state action until Congress should act, and that the history implies that Congress and the Interstate Commerce Commission intended to take complete control of interstate operations.

Mr. Justice FRANKFURTER wrote a dissenting opinion expressing full agreement with that of Mr. Justice BURTON. He states: "When Congress deals with a specific evil in a specific way, subject to specified sanctions, it is not reasonable to require Congress to add, 'and hereafter the States may not also punish for this very offense,' to preclude the States from outlawing the same specific evil under different sanctions."

Y.

The case was argued by John L. Bland for California, and by D. M. Manning for Zook.

CONSTITUTIONAL LAW

Personal, Civil and Political Rights—Fourth Amendment Does Not Preclude Later Use of Documents Originally Secured for Use Before Grand Jury Illegally Constituted Because of Failure To Include Women—Order Prohibiting Their Use Applicable to Pending Proceeding Only

■ *United States* v. *Wallace & Tiernan Company, Inc.,* 336 U. S. 793, 93 L. ed. Adv. Ops. 841, 69 S. Ct. 824, 17 U. S. Law Week 4383. (No. 416, decided May 2, 1949.)

A *subpoena duces tecum* ordered the Wallace & Tiernan Company to produce certain designated documents for use in a grand jury investigation. The grand jury returned an indictment charging violation of Sections 1 and 2 of the Sherman Act. The District Court dismissed on the ground that the court's practice of excluding women from service on the jury rendered that body illegal. The court then ordered return of the documents to the company. Later, the Government filed a civil antitrust action against the company, and moved for production of the documents. Relying on *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, the District Court upheld the company's contention that when the grand jury turned out to be illegally constituted, the subpoena amounted to unreasonable search and seizure in violation of the Fourth Amendment. It therefore denied the motions. A judgment dismissing the civil action followed. (See 34 A.B.A.J. 415, May, 1948; 35 A.B.A.J. 66, January, 1949.) From this the Government appealed directly to the Supreme Court.

The unanimous opinion of the Supreme Court reversing was written by Mr. Justice BLACK. In refusing to apply the doctrine of the *Silverthorne* case, he distinguishes that case from the instant one, remarking that the search and seizure there was made without any authority from a magistrate, and was so sweeping that probably a search warrant could not have been obtained. Here, he continues, a subpoena for the production of the documents issued from a court, and the fact that there were no women on the grand jury "did not contribute to any invasion of appellee's privacy".

Answering a *res judicata* theory advanced by the company, the Court held that the fact that the Government did not appeal from the order dismissing the indictment and granting return of the documents did not bar it permanently from use of the documents as evidence. Upon dismissal of the indictment, return of the documents was a matter of course, he remarks.

After the dismissal of the indictment and before the institution of the civil action the Government had begun a criminal proceeding by information. In that proceeding the company had obtained an order precluding the Government from using any information contained in the documents. This order was not one of general, permanent outlawry, the Court said, but merely an order to prevent use in the criminal action then pending. Y.

The case was argued by Arnold Raum for the United States, and by Charles H. Tuttle for the company.

CONSTITUTIONAL LAW

Personal, Civil and Political Rights—Where First Court Martial Could Not Be Completed Because of Absence of Witnesses and Tactical Situation, Retrial by Second Court Martial Does Not Constitute Double Jeopardy

■ *Wade* v. *Hunter*, 336 U. S. 684, 93 L. ed. Adv. Ops. 779, 69 S. Ct. 834, 17 U. S. Law Week 4377. (No. 427, decided April 25, 1949.)

While a soldier participating in the invasion of Germany, Wade was charged with rape. A general court martial was convened which heard the evidence and arguments of counsel, and retired to considered the case. Later the court was reopened and it was announced that the case would be continued so that other witnesses not then available might be heard. A week later the division commanding general withdrew the charges from the court martial. He then transmitted them to the commanding general of the Third Army, the higher echelon in the chain of command, with the statement: "Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time." Wade filed a plea in bar before a new court martial, alleging that he had been put in jeopardy by the first proceedings and could not be tried again. His plea was overruled, and the case was tried, ending in conviction. After exhausting his rights to military review, Wade brought *habeas corpus* in the District Court, which ordered his release. The Court of Appeals reversed, one judge dissenting.

The Supreme Court affirmed in an opinion by Mr. Justice BLACK. He declares, "The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practice at which the double-jeopardy prohibition is aimed." He rejects any rule that absence of witnesses can never justify continuance of a trial and relies also upon evidence that the tactical situation was responsible for the withdrawal of the charges.

Joined by Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE, Mr. Justice MURPHY wrote a dissenting opinion, remarking that both sides at the first court martial had completed their arguments, and that the court had closed to consider its decision. Pointing out that the Board of Review at Paris had filed a unanimous opinion to the effect that the plea in bar should have been sustained, he says, "The harassment to the defendant from being repeatedly tried is not less because an army is advancing." Y.

The case was argued by R. T. Brewster and N. E. Snyder for Wade, and by Oscar Davis for Hunter.

CONSTITUTIONAL LAW

Personal, Civil and Political Rights—Ordinance Which, as Construed by Charge to Jury, Permits Conviction for Use of Language Which Merely Arouses Anger, Invites Dispute, Creates Unrest or Arouses Alarm, Violates First Amendment

■ *Terminiello* v. *City of Chicago*, 337 U. S. 1, 93 L. ed. Adv. Ops. 865, 69 S. Ct. 894, 17 U. S. Law Week 4395. (No. 272, decided May 16, 1949.)

Terminiello was found guilty of disorderly conduct in violation of an ordinance of the City of Chicago, and was fined $100. The alleged disorderly conduct was a speech he delivered under the auspices of the Christian Veterans of America, the language of which, it was argued, tended to incite disorder. The conviction was upheld by the Illinois Supreme Court over Terminiello's objection that the ordinance as applied to his conduct violated his right of freedom of speech guaranteed by the First Amendment.

On *certiorari*, the Supreme Court, through Mr. Justice DOUGLAS, reversed on the ground that the trial court's instruction to the jury ("breach of the peace [consists of] misbehavior [which] stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or . . . molests the inhabitants in the enjoyment of peace and quiet by arousing alarm") was a construction of the ordinance sustained by the state Supreme Court, and was therefore binding upon the federal court. He declares that the ordinance, thus construed, permitted the jury to arrive at a verdict of guilty merely upon a finding that the speech invited dispute or brought about a condition of unrest, both of which, he observes, are constitutionally protected functions of free speech. The issue of whether the petitioner's speech contained such derisive, fighting words as to carry it outside the constitutional protection, he says, does not therefore have to be decided, since reversal is necessary because petitioner may have been convicted upon the unconstitutional portion of the ordinance, and such a conviction cannot stand.

The CHIEF JUSTICE wrote an opinion dissenting on the ground that no objection to the instruction was made at the trial and that the point was not raised in any of the appeals.

Mr. Justice FRANKFURTER, joined by Mr. Justice JACKSON and Mr. Justice BURTON, also wrote an opinion dissenting, on the ground that the constitutional point, relied upon by the majority, was never raised by petitioner, and that the Supreme Court has no authority to review the judgment of a state court unless "some claim under the Constitution or the laws of the United States has been made before the State court whose judgment we are reviewing and unless the claim has been denied by that court."

Mr. Justice JACKSON, joined by Mr. Justice BURTON and, on the merits, by Mr. Justice FRANKFURTER, wrote a dissenting opinion in which he reviews at some length the language used by Terminiello in his speech. He construes the charge only as saying "that if this particular speech added fuel to the situation already so inflamed as to threaten to get beyond police control, it could be punished as inducing a breach of peace." Y.

The case was argued by Albert W. Dilling for Terminiello, and by L. Louis Karton for the City of Chicago.

COURTS

Court of Claims Has No Jurisdiction on Review of Mail Transportation Rate-Making Order of Interstate Commerce Commission To Fix New Rates or To Grant Money Judgment for Such Amount as It Considers that the Rate Should Have Produced

■ *United States* v. *Jones; Jones* v. *United States*, 336 U. S. 641, 93 L. ed. Adv. Ops. 715, 69 S. Ct. 787, 17 U. S. Law Week 4320. (Nos. 135 and 198, decided April 18, 1949.)

In 1931, Jones' predecessors as receivers of the Georgia and Florida Railroad filed an application with the Interstate Commerce Commission for a re-examination of rates then applicable to it for transporting mails. In 1933, the Commission denied an increase, holding that the rates in effect were fair and reasonable. The railroad brought suit in the District Court to set aside the Commission's order. A three-judge court held the order unlawful. Upon remand, after further hearings, the Commission again found the rates to be fair and reasonable, and denied an increase. A second hearing by the three-judge District Court was had, and that court again held the Commission's order illegal. Upon direct appeal to the Supreme Court, the District Court was reversed on the ground that the order was not of a type reviewable under the Urgent Deficiencies Act (former 28 USC §§ 41(28), 47). *United States* v. *Griffin*, 303 U. S. 226 (1938). Relying upon language in the *Griffin* decision, the railroad turned to the Court of Claims. That Court awarded the railroad a $186,707.06 money judgment as additional compensation for carrying mail for the period 1931 to 1938. This was 87 per cent more than the amount allowable under the ICC's order. The Supreme Court granted *certiorari*.

The Court's opinion was delivered by Mr. Justice RUTLEDGE. He reviews the history of the case and notes that Congress has nowhere given the Court of Claims authority to review the ICC's rate-orders. Then, in reversing, he declares that the Court of Claims has not given proper weight to the findings of the Commission, and improperly placed the burden of proof upon the Commission to show that the rate as applied was fair and reasonable. After reviewing the method used by the Commission to determine the rates for carrying mail, he concludes that the carrier has not sustained its burden of showing that the Commission acted unreasonably or arbitrarily.

He then turns to the question of the jurisdiction of the Court of Claims. He notes that language in the *Griffin* case indicates that that Court has jurisdiction in such matters "to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, unpaid through failure of the Commission, because of an error of law, to order payment thereof." This does not imply that the Court has power to reopen the entire question of the appropriateness of the order or to substitute its judgment for that of the ICC, he de-

clares. The claim, he says, must be one consistent with the Commission's order fixing the rate, but asserting underpayment by reason of some error of law in its application which would not require the Commission's further consideration for fixing a new rate. Here, he holds, the Court of Claims has made a new order. As for the contention that the Court of Claims' jurisdiction rested upon denial by the Commission's order of just compensation, he says that the railroad has made out no such case, and remarks that the Court of Claims did not rest its jurisdiction upon that ground. Moreover, the Court of Claims has no jurisdiction to remand to the Commission or to fix a rate independently. He concludes by suggesting that the District Courts are the proper tribunals for challenging the validity of a Commission order. Y.

The cases were argued by Philip B. Perlman for the United States, and by Moultrie Hitt for Jones.

DRUGS AND DRUGGISTS

Duty of Appellate Court—On Appeal from Condemnation of Machines in Proceeding Based on Allegedly False Claims of Curative and Diagnostic Capabilities for Them, Court of Appeals Should Pass on Question of Sufficiency of Evidence To Support Charge of False Claims of Diagnostic Capabilities Rather Than Remanding for New Trial Because of Error in Admission of Evidence on Claim of Curative Capabilities

■ *United States* v. *Urbuteit*, 336 U. S. 804, 93 L. ed. Adv. Ops. 847, 69 S. Ct. 840, 17 U. S. Law Week 4386. (No. 640, decided May 2, 1949.)

Sixteen machines with allegedly curative and diagnostic capabilities were shipped in interstate commerce. Leaflets describing uses of the machines were shipped separately. A proceeding brought under the Federal Food, Drug and Cosmetic Act which resulted in condemnation of the machines was reversed on a finding by the Court of Appeals for the Fifth Circuit that machines when shipped separately from descriptive leaflets could not be said to have been "misbranded when introduced into or while in interstate commerce". Thereafter (November 22, 1948), the Supreme Court reversed and remanded on the ground that separate shipment constituted a single interrelated activity. 335 U. S. 355; see 35 A.B.A.J. 59, January, 1949, and 34 A.B.A.J. 63, 508, January, June, 1948. On remand, the Court of Appeals in turn remanded the case to the District Court for a determination of which of several shipments of machines might be considered a single interrelated activity with the only shipment of leaflets. In remanding, the Court of Appeals adhered to its holding that the District Court erroneously excluded evidence as to the curative value of the machines. The case appears again in the Supreme Court on *certiorari* to the Court of Appeals brought by the Government to determine whether that court had followed the November mandate of the Supreme Court. In a *per curiam* opinion, the Court again reverses, on the ground that nothing more was needed to show that the movement of the machines and leaflets constituted a single interrelated activity and the United States was entitled to a hearing in the Court of Appeals on the question "whether the evidence of the falsity of the diagnostic capabilities of the machine was adequate to sustain the condemnation even though errors in exclusion of the other evidence were conceded." Y.

The case was argued by Philip B. Perlman for the United States, and by H. O. Pemberton for Urbuteit.

PUBLIC UTILITIES

Fund Accumulated as Result of Federal Court Stay of Finally Upheld FPC Reduction of Gas Rates Charged Pipe-Line Companies Must Be Distributed by Court Among Pipe-Line Companies, Local Distributing Companies and Ultimate Consumers by Determination of What Would Have Happened If Reduction Had Taken Effect

■ *Federal Power Commission* v. *Interstate Natural Gas Company, Inc.; Public Service Commission of the State of Missouri* v. *Interstate Natural Gas Company, Inc.; Memphis Light, Gas and Water Division* v. *Interstate Natural Gas Company, Inc.; Illinois Commerce Commission* v. *Interstate Natural Gas Company, Inc.*, 336 U. S. 577, 93 L. ed. Adv. Ops. 739, 69 S. Ct. 775, 17 U. S. Law Week 4332. (Nos. 109, 188, 209 and 212, decided April 18, 1949.)

The Federal Power Commission ordered reduction in the rates for natural gas on sales by the Interstate Natural Gas Company, Inc., to four pipe-line companies in eight states. The Court of Appeals for the Fifth Circuit issued a stay order, and Interstate deposited in the registry of the court, pending review, the difference between payments under the existing rates and those required under the Commission's order. The reduction was eventually sustained, and the question then arose as to how the fund held by the court was to be distributed. The Court of Appeals directed that it should all be distributed to the four pipe-line companies.

Mr. Justice DOUGLAS wrote the opinion of the Court. He declares that the purpose of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717, which controls, was to protect the ultimate consumer of natural gas from excessive charges, and that therefore those consumers were the intended beneficiaries of the rate reduction ordered by the FPC. The problem, he says, is to undo the wrong which the Court of Appeals' stay order caused. The pipe-line companies were held not to be entitled to the refund except in cases where their rates had been so low that they were entitled to refunds as a matter of law or where they had passed on to their customers the reductions from the date of the Commission's order. It was stated that the federal court might disburse the funds to the local distributing companies or the ultimate consumers. The problem was said to be to determine who suffered a loss as a result of the court's action and the court must make its prognostication as to what

would have happened if the stay had not been issued.

Mr. Justice FRANKFURTER wrote a concurring opinion. He would have the Court obtain an advisory report from the FPC as to what the FPC might have determined had it in the original proceeding for the reduction of the rates exercised its power to bring in all the parties.

Mr. Justice JACKSON, joined by Mr. Justice BURTON, wrote an opinion noting that he joined in the judgment and opinion of Mr. Justice DOUGLAS so that the instructions to the Court of Appeals would carry the concurrence of a majority of the Court. He states that they agree with much but not all of that opinion. He continues that he thinks that the functions of the federal court end when it has granted refunds to the last purchaser whose purchase price federal law can lawfully reduce—*i.e.*, the distributing companies.

Mr. Justice BLACK, joined by Mr. Justice MURPHY and Mr. Justice RUTLEDGE, delivered an opinion concurring in part and dissenting in part. He declares that the policy of the Natural Gas Act was to fix interstate rates of producers and wholesalers so that the federal rate reduction would lower costs to local retailers, thus permitting state and local authority to fix lower consumer rates on the federally-fixed wholesale rates. The Court's stay order blocked operation of the mechanism, he continues. He believes that the question of distribution of the fund is wholly a matter of federal law and that the fund should be distributed to the consumers without a futile effort to determine the extent consumer rates might have been reduced by state or national regulatory agencies had they been left free to act on the reduced-rate cost of gas. Y.

The cases were argued by Bradford Ross for the FPC, by John P. Randolph for the Public Service Commission of Missouri, by William C. Wines for the Illinois Commerce Commission, by John T. Cahill for Memphis Natural Gas Company, by Forney Johnston for the Southern Natural Gas Company, by William Dougherty for the Interstate Natural Gas Company, Inc., and the Mississippi River Fuel Corporation, and by Charles C. Crabtree for Memphis Light, Gas and Water Division.

STATES

If Foreign Judgment of Reviver Has Effect of New Judgment, Missouri, Despite Its Ten-Year Limitation Period, Must Recognize Colorado Judgment Entered in 1927 and Revived in 1945

■ *Union National Bank of Wichita* v. *Lamb*, 337 U. S. 38, 93 L. ed. Adv. Ops. 888, 69 S. Ct. 911, 17 U. S. Law Week 4406. (No. 500, decided May 16, 1949.)

A Missouri statute limits the life of a judgment to ten years after its rendition or to ten years after its revival. It also prohibits revival of judgments more than ten years old. The Union National Bank had a Colorado judgment obtained in 1927 and revived in Colorado in 1945. Suit upon the judgment was brought in Missouri. The Missouri Supreme Court refused to enforce it. The United States Supreme Court treated the bank's appeal papers as a petition for *certiorari*, raising the question whether full faith and credit had been accorded to the Colorado judgment, and granted the writ.

Speaking for the Supreme Court, Mr. Justice DOUGLAS held for reversal. He cites *Roche* v. *McDonald*, 275 U. S. 449, as dispositive of the merits, saying that the Court there held that, once the court of a sister state had jurisdiction over the parties and of the subject-matter, its judgment was valid and could not be impeached in the state of the forum, even though it could not have been obtained there. He stated that on the remand there would be open both the question whether the Colorado judgment was a new judgment as distinguished from a mere extension of the limitation period and the question whether the Colorado service satisfied due process. He said that it would be inappropriate to vacate the judgment and remand so that the Missouri Court might first pass on those questions because the Missouri Court had ruled that the Colorado judgment was not entitled to full faith and credit even if it was a new judgment and that was a ruling on a federal question that could not stand.

Mr. Justice BLACK and Mr. Justice RUTLEDGE dissented without opinion.

Mr. Justice FRANKFURTER, dissenting, says that the bank, to be entitled to redress, must establish that Colorado gave it a judgment which Missouri flouted, and it fails to do so unless it shows that under Colorado law a judgment of reviver is a new judgment. Since it is not clear, he says, whether the Missouri Court has resolved that issue, he would vacate the judgment and remand. Y.

The case was argued by Maurice J. O'Sullivan for the bank, and submitted by Daniel L. Brenner for Lamb.

UNITED STATES

Members of the Armed Forces Are Not Precluded from Bringing Suit Under the Federal Tort Claims Act for Damages for Injuries Not Incident to Their Military Service

■ *Brooks* v. *United States*, 337 U. S. 49, 93 L. ed. Adv. Ops. 884, 69 S. Ct. 918, 17 U. S. Law Week 4393. (Nos. 388 and 389, decided May 16, 1949.)

Arthur and Welker Brooks, both soldiers, were riding in a private automobile on the public highway when their vehicle was struck by a United States Army truck negligently driven by a civilian employee of the Army. Arthur was killed, and Welker was seriously injured. Suit was brought for damages under the Federal Tort Claims Act. The trial judge denied the Government's motion for dismissal, based on the contention that members of the Armed Forces could not bring suit under the Act, and entered a judgment for $25,425 for the decedent's estate and $4,000 for Welker. The Court of Appeals for the Fourth Circuit reversed, one judge dissenting.

The Supreme Court reversed in an opinion by Mr. Justice MURPHY. His opinion rests upon the words in the

Tort Claims Act: *"any claim"* founded on negligence. He is careful to leave open the question of the applicability of the Act to claims for injuries sustained by military personnel incident to their military service, nor does his opinion foreclose the possibility of deduction of the amount of sums payable under servicemen's benefit laws from the amount of the judgments. The cases were remanded to the Court of Appeals for consideration of the latter question. Y.

The cases were argued by W. S. Blakeney for the Brooks, and by Paul A. Sweeney for the United States.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.

Shifting Income by Creating Deductions

■ As every one knows income taxes may often be substantially reduced by shifting income from a high bracket taxpayer to other persons or taxable entities whose rates are not so high. The mechanisms most commonly employed for this purpose are the family partnership and the family trust.

The gift-with-lease-back represents a recent variation of the trust pattern. The owner of valuable business property transfers the property to a trust for his children. The trustee immediately leases the property back to the donor. The latter continues to use the property in his business, paying rent to the trustee. If the transaction is accepted at face value for tax purposes the rentals are deductible by the donor and taxable to the trustee or beneficiaries. Taxable income is thereby shifted from the donor to the trust.

In two recent cases the Tax Court has declined to recognize such leases, holding that the rentals were not deductible by the lessee. The latest is *Helen C. Brown,* 12 T.C. —, No. 146, decided June 21, 1949. The taxpayers, husband and wife, owned and operated certain coal lands and a railway siding. They transferred these properties to a trustee (the taxpayers' attorney) for the benefit of their two minor children. The trustee then (on the following day) executed a lease to the taxpayers under which they were given the right to operate the properties upon payment of rentals and royalties which, the Court found, were "reasonable . . . for the use of the facilities leased".

The Court found that the transfer and lease-back were integrated steps of a single transaction. The taxpayers never intended to part with the use of the properties. Their purpose was to make a gift to the trust of the rentals and royalties. These charges were therefore not deductible as ordinary and necessary business expenses.

Five judges dissented on the authority of *Skemp* v. *Commissioner,* — F. (2d) —, in which a similar decision of the Tax Court was reversed by the Seventh Circuit. The majority recognized that the *Skemp* case was probably not distinguishable on its facts but "respectfully refrained from following it".

The property in the *Skemp* case was an office building in which the taxpayer, a doctor, conducted a medical clinic. The property was transferred to a trust company as trustee and on the same day was leased back to the taxpayer at a rental, admittedly "reasonable", of $500 per month. The Court of Appeals allowed the deduction finding that the transfer had divested the taxpayer of any interest in the property, that the lease was valid and that the taxpayer was legally bound to pay the rent. The Court was not impressed with the argument "that the taxpayer voluntarily created the present situation".

Thus we have a fairly clear-cut difference of opinion between the Tax Court and the Seventh Circuit on the tax treatment to be accorded to such transactions. If another Circuit Court can be persuaded to adopt the Tax Court's view the issue may go to the Supreme Court.

A similar situation is presented in three other recent cases involving the corporation-shareholder relationship. *Ingle Coal Corp.* v. *Commissioner,* — F. (2d) —, (Seventh Circuit), affirming 10 T.C. 1199; *Granberg Equipment, Inc.,* 11 T.C. —, No. 85; *Catherine G. Armston,* 12 T.C. —, No. 71. In each case the corporation had leased property or accepted a patent license from its principal shareholder and had obligated itself to the payment of rent or royalties. In each the corporation or its predecessor had previously owned the property and had transferred it to the shareholder by sale or in liquidation immediately before the execution of the lease or licensing agreement. The corporation sought to deduct the rents or royalties. In all three cases the deductions were disallowed. The corporation could have continued to use the property or exploit the patents without payment of the rents or royalties in question. Such payments were therefore not deductible as "ordinary and necessary" business expenses. The Seventh Circuit distinguished its own prior decision in the

Skemp case on the ground that there the rent was fixed by "an independent trustee-bank", whereas here the corporation was controlled by the same shareholders who received the royalties; they had it within their power "to change or erase the overriding royalty obligations at any time that they chose to do so".

These corporation-shareholder cases are extreme on their facts. The decision in each is based upon a careful analysis of the corporation's prior rights in the properties involved and the conclusion that the obligation to pay rentals and royalties was assumed, not for business reasons, but for the purpose of shifting taxable income from the corporation to its shareholders. Incidentally the disallowance of the corporation's deduction does not relieve the shareholder of tax; the amount of the payment remains taxable to the latter as a dividend or distribution of profits.

Another recent Tax Court case, *Carr Van Anda Estate,* 12 T.C. ——, No. 156, involved the same general problem, the creation of a deductible item within a controlled group. The husband had advanced $25,000 to his wife to finance the purchase by her of a residence property which was later occupied by the family. The advance was evidenced by a non-interest-bearing note secured by some stock received from the husband by gift some years before. The wife's independent income was negligible. At the wife's death her estate could pay only $13,000 on the note. The Court took the view that under the circumstances the note was not a bona fide obligation intended to be repaid and refused to allow the husband's estate to deduct the unpaid balance as a bad debt.

Ross Essay Prize Considered Taxable

The Bureau of Internal Revenue has announced that winners of the Ross Essay Prize, awarded by the American Bar Association, for 1949 and future years "will be held to have received taxable income". I.T. 3690, I.R.B. July 11, 1949. The ruling specifically disapproves *McDermott* v. *Commissioner,* 150 F. (2d) 585 (Court of Appeals for the District of Columbia), holding that the award for 1939 constituted a nontaxable gift.

The ruling states generally that "Where services are required directly in connection with an award . . . any prize money received is taxable income . . .". This would apparently leave nontaxable such awards as the Nobel prizes which are given in recognition of public service or achievement generally. The ruling does not touch the problem of *Pauline C. Washburn,* 5 T.C. 1333, in which money received by the taxpayer from the Pot O'Gold radio program was held nontaxable.

President's Page

(Continued from page 751)

of the legal profession in France and Italy. Our missions to Paris and Rome were recognized by the American ambassadors in each city as an unusual contribution to the development of a better understanding not only between the Bar Associations and the lawyers of France and Italy and America, but as a contribution also to a better understanding between the countries officially.

Vittorio Emanuele Orlando, the grand old man not only of Italian lawyers, but of the whole of Italy, in his speech at the Palazzo Di Giustizia in Rome expressed the view that whether our legal systems stem from the common law or from the Roman law, there is no such basic or fundamental difference in the concept of rights underlying each system as should make us strangers toward each other in the field of law. He expressed the hope that some means might be found to offer a prize in legal research, similar to the Nobel Price in literature and science, for the best study or treatise each year dealing with the historical and juridical concepts underlying the so-called "common law system" and the so-called "Roman law system"—such a prize to be open to competition by the members of the Bars of all the countries concerned. [See page 726 of this issue.] It is to be hoped that the American Bar Association may find ways and means of carrying out this suggestion, for it involves a type of legal research and study not heretofore undertaken, but of great international importance.

Lastly, I wish to express to my fellow officers of the American Bar Association and to the Board of Governors, and to Mrs. Ricker and the headquarters staff, and to the members of the various Committees and Sections and their Chairmen, and to the members of the Association generally, my heartfelt thanks for their uniform cooperation and consideration throughout the year. Through their help and loyalty the work of the Association has gone forward in a spirit of mutual understanding and the year's accomplishments are the result of the teamwork of all.

Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE

Civil Service . . . veterans . . . Massachusetts civil service statute granting to disabled veterans preference superior to that of veterans in placement on eligible lists does not exceed permissible bounds of legislative power.

■ *Smith* v. *Director of Civil Service et al.*, Mass. Supreme Jud. Ct., June 22, 1949, Wilkins, J.

The Court in this action held that a Massachusetts civil service statute which bestows upon disabled veterans a preference superior to that of other veterans in being placed upon eligible lists was constitutional and did not exceed the permissible bounds of legislative power. In reply to the contention that a disabled veteran is not better qualified for public service by reason of his experience than one not disabled, the Court stated that it was open to the legislature to say that the public interest is served by additionally preferring those veterans who have incurred disability in the course of their service.

Constitutional Law . . . Sixth Amendment . . . right to a public trial in federal court may be waived.

■ *U.S.* v. *Sorrentino*, C.A. 3d, July 6, 1949, Maris, C.J.

Defendant, convicted with others for conspiracy to violate the Mann Act, appealed on the principal ground that he was denied his constitutional right to a public trial, as guaranteed by the Sixth Amendment. It appeared from a certificate filed by the trial judge that all persons except the defendants, their counsel, witnesses and members of the press were excluded from the courtroom on the first day of the trial when the jury was selected, but that the public was admitted on the last three days when testimony was taken.

The Court, stating that the question did not appear theretofore to have been considered in the federal courts, ruled that the constitutional right to a public trial might be waived by an individual defendant, as had been permitted with regard to most of the other procedural rights guaranteed to persons accused of crimes in the federal courts. The Court rejected the Government's argument that since the public was admitted on the last three days defendant actually had a public trial within the meaning of the Sixth Amendment, and maintained that the constitutional guarantee applied to the entire trial. The Court found, however, that defendant validly waived his right to a public trial since all of the three lawyers representing him had stated that they did not object to the proposed exclusionary order.

Constitutional Law . . . personal, civil and political rights . . . President's Loyalty Order held constitutional since Government employee has no constitutional right to his position.

■ *Washington* v. *Clark*, U.S.D.C., D. C., June 28, 1949, Holtzoff, J.

The Court, in an action attacking the constitutionality of the President's Loyalty Order providing for the dismissal of federal employees for disloyalty or security reasons, upheld the validity of the Order and ruled that one does not have a constitutional right to become or remain a government employee. In exercising its right to select its own employees and to attach conditions to their employment, the Government was deemed entitled to dismiss, although not to imprison, employees "for utterances which they have a right to make under the Constitution". The Court ruled that the requirements of the Due Process Clause, while clearly applicable to judicial and quasi-judicial processes, do not circumscribe the Government as an employer in discharging employees it finds undesirable for one reason or another. Accordingly, it was stated, there is no right of appeal to the courts from such an order of dismissal, regardless of the "serious and even devastating" consequences to the employee in question.

(See also similar ruling by Judge Holtzoff in *Bailey* v. *Richardson*, U.S.D.C., D.C., July 28, 1949.)

Courts . . . *forum non conveniens* . . . federal court has discretion to stay action pending outcome of earlier state court action . . . discretion not abused.

■ *Mottolese* v. *Kaufman*, C.A. 2d, July 6, 1949, L. Hand, C.J.

Plaintiff's stockholders' derivative action was brought against the directors and other alleged wrongdoers during the pendency of two similar actions, instituted by other shareholders through the same attorneys, one in the state court and one in the same federal district court. Pending the outcome of the state court action the respondent district judge had stayed proceedings in the federal court, including taking depositions of three corporate defendants which was the subject of a motion to vacate the notice. Plaintiff's petition for a writ of *mandamus* directing the respondent judge to pro-

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EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

ceed with hearing and trial of the action was denied.

The Court noted that the writ should issue if the stay were wrong since otherwise, the real party in interest being the corporation, a judgment in the state court would probably determine the issue and in effect deprive the federal courts of further jurisdiction. The Court maintained, nevertheless, that in view of the development of multiplicity-of-suits and *forum non conveniens* doctrines, the statutory privilege of access to a federal court was no longer absolute and indefeasible, but subject to stay at the discretion of the court.

Since the federal court action could not be consolidated with the state court action, the Court held that it was proper to stay the federal except as some reason appeared why the claims could not be as speedily and as effectively prosecuted in the state action as in the federal. The only procedural disadvantage in the state court was said to be that the practice of taking depositions there was restricted and cumbersome and subject to extensive delays by appeals. That disadvantage could be obviated by use of the federal depositions in the state court action. Until the defendants in the state court action refused to allow the examinations, when taken, to be used in that action, it was said that a petition to stay the federal court action was premature. The writ was therefore denied. The opinion states that, unless defendants should submit to as full examination in the state court as could be obtained in the federal, the federal judge should decide the motion to vacate the notice of taking depositions as a matter of federal procedure, and, if he denied it, should permit plaintiff to take the examinations, and, if the defendants refused to consent to their use in the state action, should permit the federal action to go forward.

Frank, J., dissenting, maintained that the majority decision was unprecedented and went "a long way towards wiping out a substantial part of the diversity of citizenship jurisdiction of the federal courts." He construed the majority opinion as putting on plaintiff the burden of showing why the federal suit should not be stayed, which was, he said, contrary to Supreme Court decision and established doctrine. Moreover, he contended, the plaintiff had met the burden by showing the cumbersome nature of state deposition procedures. This had not been obviated by the suggestion of using the federal deposition procedure, he said, since (1) there still could be many interlocutory appeals as of right in the state action, (2) notice to all stockholders of a settlement would not be assured in the state action and (3) plaintiff would not have in the state action the same freedom that he would have had in the federal action to examine, before trial, persons other than defendants in the federal action.

Eminent Domain . . . Natural Gas Act, § 7 (h) . . . delegation of powers of eminent domain to natural gas pipe line certificate holder held constitutional, though holder not common carrier.

■ *Tennessee Gas Transmission Co.* v. *Thatcher*, U.S.D.C., W.D. La., June 8, 1949, Dawkins, J. (Digested in 17 U.S. Law Week 2608, June 28, 1949).

On the ground, *inter alia*, that the power of eminent domain had been unconstitutionally delegated to a private corporation, defendant moved to dismiss a proceeding brought under § 7 (h) of the Natural Gas Act, 15 USC § 717 (f), to condemn a right-of-way for a natural gas pipe line. Defendant maintained that plaintiff, although it held a certificate of public convenience and necessity issued by the Federal Power Commission, was not a common carrier and proposed to employ the pipeline only to transport and market its own natural gas. The motion to dismiss was denied.

In what is apparently the first case interpreting § 7 (h), the Court sustained its constitutionality and stressed the plenary power of Congress to regulate interstate commerce, pointing out that natural gas, in order to move from the point of origin to consumers in distant cities, must be transported through interstate pipelines. The Court was unable to see why the producer of natural gas should have to await construction of a pipeline operating as a common carrier before attempting interstate service. Accordingly, delegation of eminent domain powers to plaintiff was deemed within the rule permitting such delegation to enterprises having the "status of common carriers".

Eminent Domain . . . just compensation . . . establishment of a price which yielded cost of manufactured article plus profit of 10.5 per cent held to constitute just compensation for articles delivered to armed forces during war pursuant to compulsory orders.

■ *Lord Manufacturing Co.* v. *U.S.*, U.S. Ct. Cls., July 11, 1949, Jones, C. J.

Plaintiff manufactured a patented airplane engine mounting, developed over an extended period and, by 1939, accepted by virtually the entire aircraft industry as superior to any other. The mounting was necessary to the armed services and contained critical materials which plaintiff obtained through allocation orders. After a series of unsuccessful negotiations with plaintiff on the question of price, the Army and Navy issued compulsory orders for delivery of the mountings and appurtenant parts, pursuant to § 9 of the Selective Training and Service Act, and a joint repricing order under Title VIII of the Revenue Act of 1943. The Navy also entered into two contracts with plaintiff providing for the fixing of prices under the Title but reserving the right to redetermination by any court of competent jurisdiction. The prices thus established and paid allowed plaintiff a profit of 10.5 per cent over the cost of production; plaintiff's established list prices would have yielded a profit of 68.3 per cent. Plaintiff sued in the Court of Claims for the difference between the price allowed and the list price, asserting that the compulsory orders and the repricing order constituted

a taking and that just compensation required payment at the list price. The petition was dismissed.

The Court reached no definite conclusion on the issue whether the orders constituted a taking, although it indicated its belief that they probably did. Resolution of this issue was, however, deemed unnecessary since it was concluded that the prices paid constituted just compensation in any event. The Court stated that in ordinary times plaintiff's established list prices would have weighed heavily as evidence of just compensation, and it would have tended to agree with plaintiff that, due consideration being given the long and profitless period of development, a high rate of profit was justifiable. However, in view of the urgency of the war, the dependence of plaintiff upon government allocation of critical materials to continue production, and the fact that the patents represented a government concession, the Court deemed a price computed to allow a 10.5 per cent profit over cost to constitute just compensation.

Evidence . . . privilege against self-incrimination . . . plaintiff in tort action may not claim privilege as to questions directed toward contributory negligence.

■ *Sanders* v. *Goldfarb et al.*, Calif. Superior Ct., May 25, 1949, Hanson, J.

While a guest in defendant's automobile, plaintiff sustained injuries in an accident alleged to have proximately resulted from defendant driver's intoxication. Plaintiff sued to recover for his injuries, and defendant answered that plaintiff's own intoxication proximately contributed to the accident. During the proceedings, the question arose whether plaintiff, who had not taken the witness stand in his own behalf, could claim the privilege against self-incrimination and refuse to answer questions bearing on the accident. The Court ruled that plaintiff must either answer the questions or cease prosecuting the action.

The Court noted that while the rules governing assertion and waiver of the privilege by a non-party witness and by a defendant were well developed, there was a total absence of reported cases as to the availability of the privilege to a plaintiff. On general principles, however, the Court expressed the view that a plaintiff, by voluntarily seeking the aid of the courts, should be deemed to have waived his right to refuse to answer incriminating questions directed toward showing contributory negligence; analogy was drawn from the rule that a party who voluntarily takes the stand to testify as to details of the alleged tort is deemed to have waived the privilege. Further support was found in "legislative recognition of the same principle" embodied in a California statute that a plaintiff suing for personal injury is deemed to have waived the common-law privilege to block testimony by his physician, and in dicta in two California opinions *(Sears* v. *Hathaway,* 12 Cal. 277, and *Johnston* v. *So. Pac. Co.,* 150 Cal. 535).

Husband and Wife . . . divorce . . . defendant's appearance in divorce action for purpose of attacking court's jurisdiction, but subsequent withdrawal, not as matter of law "participation" sufficient to make divorce decree unassailable to collateral attack.

■ *Henricks* v. *Henricks,* N. Y. Supreme Ct., Spec. Term. Pt. I, N. Y. City, June 27, 1949, Pecora, J.

In 1943, a wife, defendant in an Arkansas divorce proceeding, appeared "especially for the purpose of filing a motion" attacking the jurisdiction of the Arkansas court, but subsequently withdrew on the date set for a hearing. The husband, defendant in the present action by the wife challenging the validity of the Arkansas decree, moved for summary judgment on the ground that the wife appeared generally in the Arkansas action and hence was foreclosed from challenging the validity of that decree.

The Court denied the motion on the ground that it could not be said, as a matter of law, that the wife's appearance in the divorce proceeding constituted "participation" by her sufficient, under the rule in *Sherrer* v. *Sherrer,* 334 U.S. 343, to make the Arkansas decree unassailable to collateral attack. The Court ruled that there was a triable issue as to the nature of the wife's appearance in the Arkansas action, and that such an issue could not be determined upon the affidavits and record evidence upon defendant's motion. The Court noted that no divorce case had yet reached the United States Supreme Court in which only a general appearance was made by a defendant, and that the Supreme Court had not yet defined the meaning of "participation by the defendant in divorce proceedings", as used in *Sherrer* v. *Sherrer.*

Schools . . . parochial schools . . . use of school district's transportation facilities by children attending parochial school precluded by Washington constitutional provision prohibiting use of public money for support of any religious establishment or sectarian schools, despite statute's provision for use of such facilities by all children attending school pursuant to compulsory attendance laws.

■ *Visser* v. *Nooksack Valley School Dist. No. 506 et al.,* Wash. Supreme Ct., June 22, 1949, Steinert, J. (Digested in 18 U.S. Law Week 2010, July 5, 1949).

Appellants sought a writ of *mandamus* to compel the defendant school district to permit appellants' children, in attending a religious private school maintained by members of the Christian Reformed Faith, to use the transportation facilities provided for children attending public school within the same district. The action was based upon a 1945 statute (Laws of 1945, Ch. 141, p. 399, §13) providing that all children attending school in accordance with state laws relating to compulsory attendance shall be entitled to use the transportation facilities provided by the school district in which they reside. The question presented was the constitutionality of the statute in the face of state constitutional provisions that all schools maintained or supported wholly or

in part by public funds shall be free from sectarian control or influence, and that no public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment.

The Court, by a six to two vote, affirmed the judgment below dismissing the action and held that the furnishing of school bus transportation to and from religious or sectarian schools constitutes support or maintenance of such schools out of public money in violation of the state constitution. In view of its sectarian ties and religious instruction, the instant school was deemed to constitute a "religious establishment" within the meaning of the constitution. Rejecting appellants' contention that the transportation inured exclusively to the benefit of the pupils and their parents, the Court asserted that such free transportation was a vital financial consideration in the school's operation and constituted a public subsidy, serving to enhance school attendance at public expense. Such transportation was said to differ, in both degree and nature, from "those indirect, incipient and incidental benefits which accrue to schools, as buildings, or to its pupils, as citizens, under normal health, welfare, and safety laws of the state". The Court further asserted that, although such transportation might be in furtherance of compulsory educational policy and might represent legislative concern for the safety of school children in use of the highways, the extension of transportation facilities to children attending various sectarian or private schools conflicted with the principles of uniformity and consolidation of the public schools into relatively few units. Reference was made to the Court's decision in *Mitchell* v. *Consolidated School District No. 201*, 135 P. (2d), 79, in which a 1941 statute, affording "all children attending any private or parochial school" the same transportation privileges as those accorded children attending public school, was held to violate the state constitution. The Court acknowledged the opinion of the United States Supreme Court in *Everson* v. *Board of Education*, 330 U. S. 1, that the furnishing of public transportation to parochial schools was not an "establishment of religion" within the prohibition of the First Amendment of the Federal Constitution, but maintained nevertheless that the Washington constitution clearly denied the rights asserted.

(Cf. *Kentucky Building Commission et al.* v. *Effron*, Ky. Ct. App., May 20, 1949, Sims, C. J., which held that a Kentucky statute authorizing the allocation of tax funds for use in the new construction of nonprofit hospitals, denominational but open to all shades of belief and nonbelief, did not violate Kentucky's constitutional prohibition against giving preference to any religious sect, society or denomination.)

Social Security . . . unemployment compensation . . . under statute denying benefits to participants in labor dispute, but extending benefits to victims of lockout, it is immaterial that lockout sprang from labor dispute.

■ *Bucko* v. *J. F. Quest Foundry Co.*, Minn. Supreme Ct., June 24, 1949, Knutson, J.

A labor union, representing employees of twelve Minneapolis foundries, on the one hand, and the foundry operators, banded together as a loosely-knit organization, on the other, were unable to reach agreement during collective bargaining. Thereupon the union called a strike in three of the foundries. The other nine foundry operators, pursuant to a previously-announced program, laid off their workers and closed down. A number of employees thus locked out of the nine foundries claimed unemployment compensation. This was allowed by the state agency. Pursuant to stipulation of the parties, the instant case was then taken to the state Supreme Court on *certiorari*, the decision on points of law to govern all other cases. The Court affirmed allowance of the claims.

The decision turned in part on the Minnesota statute, which disqualified for benefits a person unemployed because of a labor dispute, but exempted from such disqualification the victim of a lockout. A fundamental issue was raised by the employer's contention that, in view of the purposes of unemployment compensation, the term "lockout" should be so construed as to deny benefits to participants in a labor dispute causing the lockout. The Court noted that, had the legislature intended such a limitation on the lockout proviso, it could have adopted appropriate phraseology, as in the Connecticut and Mississippi statutes, and concluded that the legislature had intended to extend benefits to any employee affected by a lockout, regardless of how or why instituted. Insofar as concepts of "fault of the employee" were controlling, the Court maintained that the "*fault* which governs is the ultimate and final act causing the unemployment rather than any preliminary act which might furnish a motive for a lockout causing the unemployment."

Further Proceedings in Cases Reported in this Division.

■ The following action has been taken by the United States Court of Appeals for the Second Circuit:

PETITION BY THE NATIONAL LABOR RELATIONS BOARD FOR ENFORCEMENT OF AN ORDER GRANTED, July 1, 1949: *NLRB* v. *National Maritime Union of America*—Labor Law (34 A.B.A.J. 948, October, 1948).

■ The United States Court of Appeals for the Third Circuit, on June 7, 1949, on remand from the United States Supreme Court which had vacated its prior judgment, reversed the judgment of the district court: *Woods* v. *Durr*—War (35 A.B.A.J. 66, 335, January, April, 1949).

■ The United States District Court for the Southern District of New York, on July 8, 1949, ruled that the action was not subject to dismissal on motion of defendant baseball teams because of Commissioner's inaccessibility to service of process: *Martin and Lanier* v. *Chandler et al.*—Injunctions (35 A.B.A.J. 501, 679; June, August, 1949).

Department of Legislation

Harry W. Jones, Editor-in-Charge

Middleton Beaman: Doctor of Laws

■ The recent retirement of Middleton Beaman, after more than thirty years of continuous service as Legislative Counsel to the House of Representatives, provides the occasion for a brief account of the circumstances surrounding the establishment of the Office of the Legislative Counsel of the Congress and for a few sentences in appreciation of Mr. Beaman's unique contribution to the legislative development of the law of the United States. In this instance the man and the Office seem inseparable, since the Office of the Legislative Counsel was, in a very real sense, built around Mr. Beaman and created as the direct result of work which he had been doing on an informal basis for over-burdened House committees. Lawyers familiar with the work of the Office, and with the traditions of devoted and resourceful public service which have come to characterize its activities, were happy to hear that the new Legislative Counsel to the House is Allan H. Perley, an Assistant Legislative Counsel since 1925 and one of Mr. Beaman's closest associates in the House drafting service.

The events leading up to the establishment of the Office of the Legislative Counsel were traced in detail in an interesting 1929 law review article by Frederic P. Lee, one time Legislative Counsel to the Senate. ("The Office of the Legislative Counsel", 29 *Col. L. Rev.* 380). The facts, in summary, are these. In 1916 the directors of the Legislative Drafting Research Fund of Columbia University undertook to give Congress a practical demonstration of the value of skilled legislative drafting in the sound development of the statute law. Middleton Beaman, then a member of the Fund staff and former Law Librarian of the Library of Congress, was asked to take on the demonstration assignment. For two years Mr. Beaman furnished technical drafting assistance on this "lend-lease" basis, particularly for the House Committees on Merchant Marine and Fisheries and Ways and Means.

The demonstration was a complete success. A regular congressional drafting service was established by express provision in the Revenue Act of 1918, and Mr. Beaman was invited to remain as the first legislative draftsman for the House. The *Congressional Record* for February 2, 1949, containing tributes to Mr. Beaman from the Speaker, the majority and minority leaders, and other members of both parties, is eloquent evidence of the respect and regard which Mr. Beaman earned during his long period of distinguished legislative service.

Understandably enough, Mr. Beaman has never had the time to sit down and write anything in the nature of a systematic treatise on the science and art of legislative drafting. If his new and unaccustomed leisure gives him the opportunity to prepare such a volume, it will undoubtedly rank with such classics in the field as those of Lord Thring and Sir Courtenay Ilbert. In the meantime, the lawyer interested in the legislative development of the law will find it profitable to examine Mr. Beaman's testimony four years ago at the hearings of the Joint Committee on the Organization of Congress (*Hearings*, pages 413-430, April 27, 1945).

Certain of the highlights in Mr. Beaman's informal statement to the Joint Committee should be required reading in these days in which many state legislatures are considering ways to extend and improve their technical bill drafting services. Legislative drafting work must be kept on an entirely nonpolitical basis. Mr. Beaman's description of his own experience in this respect will undoubtedly astound certain of the more cynical critics of congressional processes:

> Since I was appointed some twenty-six years ago, I have never had anybody ask me my politics. I do not know the politics of any man in my office. There has been no pressure of the slightest degree to secure a job for anybody.

The effective legislative draftsman must not take it upon himself to decide the issues of policy which are before the legislative body for decision. Mr. Beaman's disclaimer of a general "policy" mission is clear and unequivocal:

> Our office has nothing to do with policy whatsoever. We try to find out what the committee wants to do and help them do it.

Here is a useful reminder that the lawyer who has a legislative committee or body as his client must be willing to accept the basic judgments of value and expediency which are compelling to the elected representatives and must act on the principle that the clear and consistent expression of legislative intention is always in the public interest, even if the objectives which the proposed statute seeks to attain do not coincide with the personal preferences of the working draftsman.

Perhaps the most instructive part of Mr. Beaman's testimony before the Joint Committee is his discussion of the familiar misconception that the job of the legislative draftsman is essentially a recording assignment, an exercise in English composition:

> By far the greater part of our work is not the writing down of the words on the paper; it is the analysis, the finding out, in the light of the exist-

ing legal and factual situation, of what it is that is intended by the person for whom we are working. That is the reason why we feel we can function most effectively in what we call our complete job, when we have been at all the committee meetings, so we really know what it is they have decided, and so we can bring to the attention of the committee the subsidiary questions of policy which our study and analysis have brought to light, and which should be decided by the committee.

And again:

> The number of contingencies that a lawyer has to guard against in the case of a will or contract, while sometimes they are very numerous, are mere fly specks compared with the contingencies that must be considered in the case of a statute.

The most appropriate academic ceremony of 1949 was certainly the action of Columbia University at its last commencement in conferring the degree of Doctor of Laws on Mr. Beaman. Universities are in the habit of granting the LL.D. degree in recognition of achievement in many fields, few of which have anything at all to do with law or the laws. But Middleton Beaman, in a literal and unique sense, is richly entitled to the designation, Doctor of Laws.

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

■ Several resolutions with respect to American policies in the United Nations are pending now before the Congress of the United States. They may influence our foreign policy as much as the Vandenberg Resolution adopted in 1948. The relation of the new resolutions to the Vandenberg Resolution and a history of the implementation of the Vandenberg Resolution should be brought, therefore, to the attention of the American Bar before a decision is made to endorse or oppose the far-reaching proposals embodied in these resolutions.

Strengthening the United Nations

■ Over a year ago, on July 11, 1948, the Senate of the United States adopted, almost unanimously (by a vote of 64 to 4) the so-called Vandenberg Resolution, reaffirming "the policy of the United States to achieve international peace and security through the United Nations". In particular, this Resolution stated six objectives to be pursued by the United States "within the United Nations Charter". It might be useful at this time to review the efforts of the United States to fulfill these objectives.

> (1) Voluntary agreement to remove the veto from all questions involving pacific settlements of international disputes and situations and from the admission of new members.

The attempt to remove the veto from at least a few questions to which it at present applies has not succeeded. The Interim Committee of the General Assembly (the "Little Assembly"), which has made a careful study of this subject, made a list of questions of a procedural character or closely related to procedural questions, to which the veto should not apply. In addition, it recommended that certain other questions be considered as "procedural" and therefore not subject to veto, regardless of the fact that the "procedural" character of these questions may be subject to doubt. These recommendations were endorsed by the General Assembly, but have been consistently opposed by the Soviet Union and her allies, which claim that these recommendations present an unconstitutional attempt to circumvent the Charter. In particular, the Soviet Union refused to abandon her veto with respect to admission of new members.

On the other hand, the United States rejected the Soviet offer to admit all applicants for United Nations membership regardless of the merits of the particular applications. It might have been more consonant with a long range policy of universal membership if the United States had taken advantage of the Soviet offer and thus not only solved an undesirable deadlock but also extended United Nations membership to such important countries as Italy, Ireland and Portugal, even if at the same time the door had to be opened to Rumania, Bulgaria and other friends of the Soviet Union.

> (2) Progressive development of regional and other collective arrangements for individual and collective self-defense in accordance with the purposes, principles and provisions of the Charter.
>
> (3) Association of the United States, by constitutional process, with such regional and other collective arrangements as are based on continuous and effective self-help and mutual aid, and as affect its national security.
>
> (4) Contributing to the maintenance of peace by making clear its determination to exercise the right of individual or collective self-defense under Article 51 [of the Charter] should any armed attack occur affecting its national security.

In fulfillment of these three interlocked objectives the United States joined with ten Western European countries and Canada in the establishment of the arrangements for collective defense of the North Atlan-

tic area. The Treaty signed at Washington on April 4, 1949, and already ratified by the United States, defines in clear and unmistakable terms the obligations of the contracting states to assist each other in case of an armed attack. To enable the other parties to the Treaty to fulfill their obligations, the United States has taken steps to furnish them such military assistance as would give their armies a fighting chance to repel aggression.

These developments, which have often been compared in importance to President Monroe's famous message of December 2, 1823, are considered by many only as stop-gap measures designed to deter aggression for a period long enough to permit the United States to formulate a policy which would strengthen the United Nations in a more direct manner. Others do not consider the North Atlantic Pact as a sufficient temporary war preventive and advocate as a supplement thereto a North Atlantic Federation uniting the nations of North America and of Western Europe under a form of government closely resembling the government of the United States. On July 26, 1949, eighteen Senators introduced a resolution in the Senate requesting President Truman to call a convention of representatives of the parties to the North Atlantic Pact to explore the possibilities of an immediate federation. This resolution constitutes the latest adaptation of the proposals for a "Union of the Free" made since 1939 by Clarence Streit, and it is the result of the efforts of the Atlantic Union Committee which is under the presidency of former Supreme Court Justice Owen J. Roberts.

(5) Maximum efforts to obtain agreements to provide the United Nations with armed forces as provided by the Charter, and to obtain agreement among member nations upon universal regulation and reduction of armaments under adequate and dependable guaranty against violation.

During the preceding year, the United States has not even made minimum efforts to obtain a disarmament agreement or to make available to the United Nations the armed forces envisaged in Articles 43 and 45 of the Charter. The Soviet Union continued to maintain initiative in this field and made concrete proposals for a sizable reduction of national armies. The whole effort bogged down, however, when the Soviet Union refused to consider detailed measures for supervision of any disarmament provision. No agreement could be reached on even the first step on the long road to disarmament—the determination of the size of national armies and armaments and the verification by the United Nations of the figures presented by national governments.

(6) If necessary, after adequate effort toward strengthening the United Nations, review of the Charter at an appropriate time by a General Conference called under Article 109 or by the General Assembly.

As none of the other ways of strengthening the United Nations seems to lead to any concrete result, the advocates of a revision of the Charter are becoming more insistent and are gathering their forces for an outright attack on the deficiencies of the Charter. On June 7, 1949, eighty-eight Congressmen and on July 26, 1949, eighteen Senators introduced resolutions seeking the development of the United Nations into a World Federation. They proposed that "it should be a fundamental objective of the foreign policy of the United States to support and strengthen the United Nations and to seek its development into a world federation open to all nations with defined and limited powers adequate to preserve peace and prevent aggression through enactment, interpretation and enforcement of world law". It is not proposed to create a world government on the model of the United States, with broad powers in the economic field, but only a world federation with limited powers, *i.e.,* powers limited to those directly connected with prevention of war through disarmament and world police.

Once this objective is adopted by the United States, it would not imply that a world federation would immediately come into being. There are many difficult problems which would have to be explored first. As stated by Ambassador Austin in the May issue of *Harper's Magazine*, there are at least two basic problems requiring a detailed solution: "(1) How would voting power be arranged . . . (2) What would limit the exercise of world police power over disarmed nations, or protect a minority against tyrannical action. . . ." If the United States decides to follow the road to a world federation, it might propose that the United Nations embark on a study of these questions and other related problems. Such a study may be entrusted to the Little Assembly or to a special committee of constitutional experts. The North Atlantic Pact has given to the world a breathing spell. It is important to utilize it properly, before the advantage gained by the peace-loving nations has been dissipated.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Is the English Legal Aid Plan the Road to Socialized Law?

■ This communication is prompted by the publication in the AMERICAN BAR ASSOCIATION JOURNAL, June issue, of the article "The English Legal Assistance Plan: Its Significance for American Legal Institutions", by Reginald Heber Smith, one of your editors.

Because I am opposed to the English government-endowed Legal Aid and Advice Bill, I am alarmed at the apparent approval bestowed by the JOURNAL. That there are others in the American Bar Association who share my belief is indicated by the closing remarks of the 1948-49 Annual Report of the Standing Committee in Legal Aid Work of the American Bar Association, Chairman Orison S. Marden of New York:

> During the coming summer, it is expected that the British Parliament will enact legal aid legislation providing government funds to cover legal assistance for indigent persons and also for a large segment of the population in the lower income brackets. Although it is argued that since the handling of the funds will be under the direction of The Law Society, the Bar remains independent, the scheme can conceivably be a long step toward socialization of the legal profession. Its operation in this country would have consequences most lawyers would not like to envisage. We have too often learned the lesson that the ultimate power lies in the hand that controls the purse strings. However we may regard the merits or advisability of the English plan, it seems certain that unless the organized bar is able, in partnership with local communities, to give adequate legal advice and assistance to those who cannot afford to pay, some such government scheme will be proposed and perhaps become a reality. If that day comes, the cherished independence of the bar will at least receive a serious blow. In the medical profession, we are currently witnessing governmental proposals which many believe will result in a lowering of the standards and independence of the medical profession.

Mr. Marden and I are in accord that the English plan, or any plan involving government paying the bills is not for us; control of the purse controls the project. That Mr. Smith may not agree is not alarming, but that the American Bar Association should indicate, as I believe it has, that it favors the English plan, is a matter of real concern.

Despite the fact that Mr. Smith says the facts are quite contrary to the belief here that the English plan is "another vital step by the Labour Government towards complete socialism" and despite the fact that the JOURNAL says "we consider [that] to be an accurate and authoritative statement", I am sure that I am not alone among American lawyers who disagree, and who are deeply concerned with the JOURNAL's apparent sponsorship of Mr. Smith's article.

The fact that the origin of the English plan lies in the Legal Aid Committee of the Law Society and the Rushcliffe Committee Report filed two months prior to the Labour Government's coming into power rather than in the Labour Government itself, and that legal aid in England has lagged far behind its development in the United States, may indicate "respectability" of origin and reason for its adoption in England, but to me it's still a long step, albeit a first one, in the direction of government control and regulation of lawyers, their services, fees and relations with clients, in a word socialization of the legal profession.

The first four of the five enumerated basic principles underlying the English Plan, so fully set forth in the Smith article, are completely disarming. Who can disagree that

> 1. No person should be deprived of legal services because he's too poor to pay;
>
> 2. Those who can afford to do so should pay what they can;
>
> 3. Legal services should be provided by lawyers who should be paid, and
>
> 4. The profession and not Government should administer legal aid.

However, don't miss the fifth basic principle, wrapped up in it is all the meat and substance of disagreement which I hope will be widespread and vocal among American lawyers.

> 5. In so far as it is not found from other sources the cost should be borne by the State.

Mr. Smith's comment follows:

> Here the English Plan is being logical. If the cost of adhering to Principle No. 3 exceeds the receipts that can be expected under Principle No. 2, then the difference must be defrayed by public funds.

My concern is not that Mr. Smith feels as he does, and not that the JOURNAL is available to him for expression of his ideas, but that the JOURNAL should approve and adopt those ideas as its own and characterize them as "accurate and authoritative". The JOURNAL editorial on page 488 of the same issue does nothing to limit my concern.

I have urged Mr. Marden as Chair-

man of the Standing Committee on Legal Aid Work of the American Bar Association to do what he can to preach the dangers inherent in the application of the English plan to American legal aid. No matter how difficult the path of the development of American legal aid may be, I hope that the members of that Committee and other American lawyers will not be diverted to the easy road, the one paved with government dollars.

WALTER CHALAIRE
New York, New York

Expresses Disagreement with Mr. Kenyon

■ Mr. Kenyon's statistics in the AMERICAN BAR ASSOCIATION JOURNAL for June, 1949, regarding the numbers of patents held valid, invalid or not infringed do not constitute an adequate reply to the essence of Drury Cooper's complaint.

For example, it is not believed that any district judge appointed previous to the year 1933 would make the following statement which is quoted from an opinion dated late in 1948, the words in brackets being substituted in the quotation.

> Undeniably, the plaintiff's [device] was novel, presented a genuine improvement to the . . . trade, and had remarkable public acceptance. Under the state of the law as it formerly existed, these elements would probably combine to produce patentable invention. Under the present state of the law, however, the plaintiff's device cannot be accorded this distinguished status and must be regarded merely as a mechanical improvement of a skilled tradesman in his line of work, and lacking that "flash of genius" necessary to constitute invention.

In another recent case, the district court said that "the most that can be said for [the device] is that it improved the various elements or combined the various elements contained in the prior art patents".

Also, not long ago, a district court judge, in commenting upon a remark by counsel as to the *prima facie* validity of a patent stated that nowadays "we decide those things pretty much for ourselves". As to the last two quotations, the cause for complaint is not whether the ultimate decision was right or wrong but as to the attitude of the courts with respect to patents.

A common defense in patent infringement suits is that the patent in suit "does not differ substantially from the prior art", and that therefore the patent is invalid. The defendants however do not explain why they adopted the structure instead of using what is "substantially the same thing" in the prior art which more often than not is shown in expired patents.

There has been no change in the patent statutes to justify the expressions "under the state of the law as it formerly existed" and "under the present state of the law".

(The quotations above are not from decisions in my home circuit.)

ARCHWORTH MARTIN
Pittsburgh, Pennsylvania

Another Reply to Mr. Kenyon

■ The statistics that appear in the article by W. Houston Kenyon, Jr., entitled "Patent Law: Why Challenge the Court's View of 'Invention'?," published in the June, 1949, issue of the AMERICAN BAR ASSOCIATION JOURNAL, at first sight appear startling.

Mr. Kenyon does not reveal the source of his figures, but states simply that in the decade ended in 1945, the United States Supreme Court adjudicated thirty-six patents, of which it sustained five.

These figures differ from those obtained from a survey presented in 1941 to the Patent Bar of Chicago by the Honorable Evan A. Evans of the United States Court of Appeals for the Seventh Circuit, in which he developed the information that in the five-year period, 1936-1940, there were heard by the Supreme Court a total of fifteen cases pertaining to patents, of which the Court sustained none, and from those obtained by Daniel G. Cullen, who found that from 1941 to 1945, eighteen cases were heard and two patents held valid. When these surveys are jointly considered the information adduced is that in the decade ended in 1945, the United States Supreme Court heard in all thirty-three cases involving patents, holding two valid and infringed.

It is possible that these differences can be reconciled. But even if Mr. Kenyon's statistics prove correct, they are nevertheless far from conclusive. Mr. Kenyon compares a fifteen year period ending in 1895 with a ten year period ending in 1945, and makes certain deductions. He ignores the entire half century of Supreme Court patent history therebetween. This hardly represents the facts, and as to the current trend, proves nothing.

The problem to which Mr. Kenyon addresses considerable discussion is whether or not in 1932 or 1933 or thereabout, there occurred a turning point in the policy of the Supreme Court with respect to patents. If we are to reach any valid conclusions as to the question presented, obviously it is necessary to examine with some care the events that immediately preceded the alleged turn. According to the Evans survey the decades 1921-1930, 1911-1920, and 1900-1910, show 23 per cent, 45 per cent, and 31 per cent patents held valid, respectively. Therefore, even if Mr. Kenyon's figure of 14 per cent for 1936-1945, should prove correct, rather than the 6 per cent found by other investigators, the fact that there occurred a marked turn for the worse is supported. This shows up even more distinctly when the figures are analyzed by half-decades as was done by Judge Evans.

Moreover the whole matter cannot be left to statistics. The consensus of opinion of those who are close to the situation, including even members of the Court itself, is that a change has occurred. This conclusion is not based on statistics alone, but on the nature of the decisions. Judge Evans stated very cogently:

> The record of the Supreme Court during the last five years indicates not only a decided trend but a raising of

the standard of invention so high that few inventions or discoveries will meet the test.

There is no need to labor the point. Mr. Kenyon is an exception to the rule that leading members of the profession are deeply apprehensive of what the present tenor of the decisions of the Supreme Court portend for the future of the American patent system.

J. HAROLD BYERS

Washington, D. C.

Compulsory Licensing and Cartels

■ In the July JOURNAL Mr. Ambruster of Westfield, New Jersey, asks for a definition of "cartel". I know of no such definition that would necessarily be given the sanction of the United States Supreme Court, but I do know of one which may give Mr. Ambruster some help, unless he has already seen it, and which has received the sanction of some authority.

Professor Charles R. Whittlesey has written a book *National Interest and International Cartels* (Macmillan, $2.50) which may help Mr. Ambruster. In Chapter I of that book, Professor Whittlesey defines cartel; perhaps the simplest definition of cartel practices is that suggested by a Department of Justice official, reproduced by Professor Whittlesey: "everything that would be held to be in conflict with the anti-trust laws if carried on within the United States".

I discussed Professor Whittlesey's book at considerable length in the first drafts of my paper "Compulsory Licensing and National Defense" (35 A.B.A.J.), but dropped all reference to the book in the draft submitted to the JOURNAL editors in the interest of shortening the article. Professor Whittlesey has written what is on the whole an excellent treatment of the subject of cartels, and I recommend his book to anyone interested in the problem. Nevertheless, I must disagree with Professor Whittlesey's recommendation of compulsory licensing of patents. As I pointed out in my June article, the problem presented by atomic energy in its destructive aspects is international in scope. Likewise, of course, the problem of cartels is international in scope. Professor Whittlesey recognizes the international scope of the problem of cartels but, curiously enough, he does not put the solution on the international level. Compulsory licensing of patents is a nationalistic, rather than an international, approach.

It is interesting to try to reconcile Professor Whittlesey's suggested solution (compulsory licensing of patents) with the definition of cartels which he has adopted for his book. If a cartel practice is "everything that would be held in conflict with the anti-trust laws if carried on within the United States", then obviously the logical solution to cartels would be an international government with an international legislature to enact an international anti-trust law, said law to be enforced by the international executive and interpreted by the international court.

If Professor Whittlesey's suggested solution of the cartel problem by compulsory licensing were logical, then he would also have to suggest that such activity as is presently in conflict with our federal anti-trust laws ought to be solved by state laws for the compulsory licensing of patents.

I hope Mr. Ambruster and others will find the foregoing of interest and helpful.

JOHN F. SCHMIDT

Franklin, Pennsylvania

A Definition of Cartel

■ With respect to Howard Watson Ambruster's communication in the July issue of the JOURNAL, page 604, the following is submitted for his and other readers' interest:

> The attorney for the United States has suggested the following definition of "cartel": "A combination of producers of any product joined together to control its production, sale and price, and to obtain a monopoly in any particular industry or commodity." [*United States* v. *National Lead Company*, 63 F. Supp. 513, footnote 5, page 523.]

I hope that the above will be of some value to those who are interested in the legal definition of the word "cartel".

JOHN C. DRAKE

New York, New York

An Economist Suggests "Preventive Law"

■ If you take your jackknife out in the garden to cut a bouquet from the rosebush and get a little careless, you may expect to cut yourself. If you experiment with the power circuit in your house and are ignorant of the laws of electricity, you may expect a more or less serious shock. Such consequences are daily demonstrations of self-enforcing laws of nature. These laws of nature are generally well enough understood so that few people would leap from the Washington Monument and expect to live to tell the tale of their adventure. To be sure one might be a little careless with the jackknife and still escape damage. Or less likely, one might fool with the electrical circuit and avoid punishment. But the man who leaps from the Washington Monument is certain of his fate. Thus in nature, man finds fairly certain punishment for carelessness, ignorance or foolhardiness graded according to the seriousness of his error.

Most of today's difficult problems are concerned with the laws of man rather than the laws of nature. And solution of these problems would seem to lie more in the direction of making man's laws self-enforcing; the punishment graded, as in nature, to the seriousness of the offense. An offending government official, industrialist or labor leader should, so far as it is in the power of human ingenuity to devise a system, receive punishment that is certain and graded to the seriousness of his offense.

Law enforcers, both civilian and military, will tell you that under sound administration of discipline the certainty of punishment is of

even greater importance than severity of punishment. How is this objective to be reached? Can our present ponderous and sometimes almost unworkable system of law, large staffs of lawyers and enforcement officials, watchmen, accountants, duplication of work in checking, etc. be simplified and still produce better results?

Many present-day social problems result from differences in opinion as to the proper share of each element in the proceeds of production. Much of the complaint centers about the question of "fairness" in the distribution of the shares of production to labor, management, owners and government.

Suppose that we could apply to these problems a *principle* similar to that applied by the old man who died leaving an estate and two sons. The old man's will provided that the lands he left were to be divided into two shares by the older son, and that the younger son was to have first choice among these shares. Such a solution makes justice almost inevitable and requires no intervention by the state. It is self-enforcing.

Wherever it is possible to harness the powerful forces of self-interest toward the solution of our social problems, it seems very likely that many of them will disappear, and that the difficulties of solution of many of the remaining will be greatly reduced. The central question is: How shall we make honesty and fairness completely to be desired by *all* parties in a dispute? The answer seems to be in the direction of finding ways to make certain of a "fair" solution.

That such solutions are not too difficult to find and that they are entirely practical in many applications, may be shown in another illustration. At one time Italy had a provision in its export laws to the effect that anyone bringing art objects out of the country was to set a valuation upon the goods himself, whereupon the state would assess an export tax at a fixed percentage of the valuation. At first glance this law would seem to give all the advantage to the exporter; since the lower the valuation he set, the lower the tax. There was, however, another provision of the law which permitted the state to purchase such an object at the valuation set by the exporter. The combination of these two provisions in the law resulted in honest valuations being placed by the exporter. If he fixed the value low in an attempt to escape the tax, he risked losing the article to the state. If he fixed the value high enough to prevent the state from taking it, his export taxes were increased. Administration of the law was simple and required a staff of minimum size.

After a recent national labor-management conference a formula was proposed. The formula provided: (1) that labor would get a ten per cent wage raise at once; (2) that management would set aside an additional five per cent as a guarantee fund which would be paid to labor if management was unable to provide fifty weeks of employment in each year; (3) that management could retain this five per cent if labor were furnished fifty weeks of employment in each year. Aside from the justice of provision (1) which rests on other considerations, the principles of items (2) and (3) would seem to achieve results that are desirable. It proposes a penalty upon management for failure to provide sufficient employment and some recompense to labor in such cases. And it gives management a reward if it is efficient enough to be able to provide full employment with consequent benefits to labor.

It should not be assumed that any formula is complete and that it will never need revision. For example, it is possible that management may fail so completely as to have no funds either for employment or a guarantee fund. Such formulae would doubtless be in the process of constant revision as application revealed their weak points. Yet the tremendous possibilities in the reduction in strife and loss to the worker, management and the public would seem to make it worth while to attempt to apply much more widely the principle here advocated.

Of course we now have formulae such as these in operation, yet if it were possible to apply these principles of self-enforcement more widely in our tax laws and other areas of disagreement, justice would be almost an automatic result. No large bodies of appraisers, lawyers, sleuths and policemen would be necessary for enforcement and many laws would ultimately become almost self-enforcing. Although the problem of application of these principles may be difficult in a given specific situation, it would seem possible that human ingenuity could find even wider applications than are illustrated in the examples set forth above.

Some of our more genial cynics are wont to observe that those who cry loudest for justice would be sore if they got it, but an objective demonstration of the principle of justice would still the clamor in many hearts and to the satisfaction of many lives.

The problem of finding such solutions would seem particularly the province of the lawyer. Of course it would cut down the number of contests in families, in business, and between government and those governed. But with the modern practice of preventive medicine, where the doctor's fee is based upon his ability to keep the patient well, it may be that the legal profession would look favorably upon "preventive law" and would find it possible to base its fees upon keeping society out of trouble, rather than spending most of its energies upon handling the disputes. No one imagines that, even under progressive development of the principles herein advocated, disputes would disappear. But the world today is acutely conscious of the necessity for ameliorating the international areas of conflict and it might be a good idea for the lawyers to give some thought to "preventive law" in order to have enough people alive to be able to do business.

LEROY E. PEABODY
Alexandria, Virginia

Takes Issue with Mr. Cooper

▪ When a practitioner of such experience as Drury W. Cooper speaks on the subject of his specialty, the patent law, his views are entitled to most serious consideration. But we cannot concur in the trend of his article in the April issue.

To say "that *patents* . . . have made America what it is", is to invite controversy at the outset. No one questions that *inventions* have contributed much to our present civilization but to ascribe the present high state of technical development to any particular cast of the patent system is to enter the field of speculation and debate. Furthermore it is to be noticed that the position of the courts which Mr. Cooper deprecates was assertedly taken in and followed "since the year 1850" and yet most of the inventions referred to in the opening of Mr. Cooper's article came forth after that date. There is no showing that the requisite of inventiveness beyond the question of novelty has retarded the productivity of inventive genius.

Our disagreement with Mr. Cooper's basic position is that it overemphasizes the interest of the alleged inventor to the prejudice of the public interest in unduly restricting the development and use of like or similar improvements by others during the period of the patent. We need not get snarled up in an argument over words as to whether a patent is a "monopoly". It is incontrovertible that a patent excludes others from making the patented article or using the patented process during the period of the patent without the consent and required consideration demanded by the patent owner. Manifestly, if the patent is to issue solely on the basis of "novelty" and not on the further requisite of inventiveness, industrial development will be saddled with a maze of retarding restrictions. As the Supreme Court long ago pointed out, it is quite as important to the public that competitive enterprise should not be restrained by unwarranted patents as it is that in a situation clearly warranted by a balancing of the interests the alleged inventor should be granted an exclusive area of production for a stated period. *Atlantic Works* v. *Brady*, 107 U. S. 192 (1883); *Pope Manufacturing Company* v. *Gormully*, 144 U. S. 224 (1892).

That it is difficult for the courts to spot that point of cleavage in particular situations, will not be denied. That some more precise method or some other tribunal might be contrived to draw that line from situation to situation, may be possible. Serious consideration has been given to various suggestions. Supplementation of the present process is undoubtedly feasible; substitution of some other tribunal to administer the process is debatable; but the complete nullification of the requisite of inventiveness seems most undesirable.

Mr. Cooper suggests that much control would still remain in determining the question of infringement. This issue would be determined, he suggests, "by the degree of advance shown by the patent". In the first place, if the advance was only such as would have occurred in the normal technological development in the industry that area should not be restricted to the exclusive use of any one. Secondly, infringement is normally a question of applying the wording of a claim; but Mr. Cooper's suggestion would, in many cases, involve determining the validity of a claim as being broader than justified "by the degree of advance" made by the particular patentee. We would thus have the same uncertainty and confusion which Mr. Cooper deprecates in the present status of the law.

Few if any areas of the law have that complete precision and certainty which is so often desired. But we do not believe that the Patent Act is a glaring extreme. Law is a continuing process of growth and readaptation and it is that process which is going on today. The Patent Act is one of the areas where that readaptation is more in evidence at the moment but we believe that the method of judicial evolution will here be found to be the more salutary course.

IRVIN H. FATHCHILD
Chicago, Illinois

The Lawyer's Work as Hollywood Distorts It

▪ The misconceptions of the public in general concerning the legal profession have been a source of concern to me for a long time.

A few weeks ago I attended the movie, "Knock On Any Door", starring Humphrey Bogart. The story was primarily concerned with a courtroom scene. From beginning to end the picture was filled with things which could not take place in a court room in Maryland and which I do not believe could take place in any court in the United States. The prosecuting attorney in his opening statement set forth the prior criminal record of the accused. The defense attorney made a long opening statement which was very dramatic in that it portrayed the past life and activities of the accused but it was not concerned with the defense of the particular case. On cross examination, the prosecuting attorney had his face just as close to the defendant's face as it was possible to get without touching. The questions and the manner of the prosecutor were little short of the third degree. The prosecutor very dramatically obtained a confession on the stand. In his plea to the court, before sentence was passed, the defense attorney turned his back on the court entirely and spoke to the spectators.

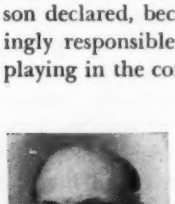
It seems to me that our Association has an obligation to make a protest to the proper studio concerning this picture. It was not an actual portrayal of what could have been expected in a real court room scene and, in my humble opinion, its lack of accuracy brings the legal profession into disrepute.

MARVIN H. SMITH
Denton, Maryland

BAR ACTIVITIES

Editor-in-Charge . . Paul B. DeWitt, Chairman, Section of Bar Activities

■ A strong appeal for greater participation in the activity of the organized Bar was voiced by retiring President Albert J. Henderson at the Annual Meeting of the Georgia Bar Association on June 2, 3 and 4. Such participation is particularly important today, President Henderson declared, because of the increasingly responsible rôle the lawyer is playing in the community and in all



Albert J. HENDERSON

Foltz

the branches of the national, state and local governments.

The speaker also called attention to the fact that since the Georgia State Bar Association was reorganized a few years ago, its membership has increased to the point where it now includes 90 per cent of all the state's active lawyers. "I think we can now boast," he added, "of a higher percentage of voluntary membership than any other state association, and we do not propose to stop until we have reached and can maintain 100 per cent membership of all qualified lawyers."

The program also included speeches by The Honorable Tom S. Candler, Associate Justice of the Supreme Court of Georgia; B. C. Gardner, Jr., Chairman of the Younger Lawyers Section of the Georgia Bar Association; and John D. Comer.

Alexander A. Lawrence, of Savannah, is the new President of the Association. Other officers are Hal C. Hutchens, Dallas, Vice President; Maurice C. Thomas, Macon, Secretary; and J. Wilson Parker, Atlanta, Treasurer.

■ The Alameda County Bar Association has this year for the first time entered the competition for an American Bar Association Award of Merit and in connection with the entry has launched a campaign to make all its members also members of the American Bar Association. As part of this effort a letter signed by both the retiring president, Cyril W. McClean, and the incoming president, Leon A. Clark, was sent to every member listing the advantages of membership in the American Bar Association.

President McClean and President Clark point out that every first-class doctor considers it imperative to belong to the American Medical Association, and go on to say, "It is no less imperative that lawyers belong to their national bar association in order to keep abreast of changing developments in the practice of law and to help in the solution of the numerous problems with which today's practicing lawyer is daily confronted."

■ The first of a series of articles designed to introduce the Bar to the numerous Philadelphia Lawyers' societies which "become aware of each other's existence only when dinner dates conflict," appears in the June, 1949, issue of *The Shingle*, the monthly publication of the Philadelphia Bar Association. This article gives an account of the origin and activities of the Juristic Society and is written by one of its former presidents, John B. Prizer.

The Society avoids taking a stand on public issues and is dedicated to the fostering of an interest in the philosophical, scientific, historical and comparative aspects of the law. Typical of its yearly activities are four or five dinners, featuring an address on a subject of current legal interest by an outstanding member of the Bench, Bar or law school faculty. By way of elaboration Mr. Prizer notes, " 'good company and good discourse' are not only the 'sinews of virtue' but also excellent stimuli for philosophical reflection —especially when accompanied by the leavening influence of food and drink. This is what the Juristic Society attempts to offer."

The Society was organized on June 24, 1925. None of its founders had been a member of the Bar for more than five or six years and one of the Society's first rules was that no person would be elected to membership who had been admitted to the Bar prior to January 1, 1917. This emphasis has been retained and, to quote again from Mr. Prizer, "When in the course of years, the age qualification mentioned above no longer insured this result, the Society decided (against the strenuous opposition of some of those who had adopted the original rule but, like Justice Field, had lived to repent their youthful disregard for age), that active membership, including the right to vote and eligibility for election to office, would terminate when a member reached his fortieth birthday."

OUR YOUNGER LAWYERS

Charles H. Burton, Secretary and Editor-in-Charge, Washington, D. C.

Annual Reports Point Up Conference Activity

■ The Chairman of the Committee on Reports, W. Carloss Morris, Jr., Houston, Texas, has now received annual reports from all Council members and Committee Chairmen. These reports reflect nation-wide activity on a broad scale in all of the varied Conference projects.

The chief recommendation of the report of the Council representative for the First Circuit, Stanley M. Brown, Manchester, New Hampshire, was the espousement of a new by-law for the Conference specifically spelling out the respective duties of the national officers, Council members and Committee Chairmen. In support of this suggestion he asserts that the elected state chairman in each state is in the best position to supervise the activities of the Conference within the state. He further suggests that they be permitted to exercise some authority over Conference officers in their states, that they be permitted to select the state officials, and that the state officials receive their instructions from and make their reports to the state chairman. In the next higher bracket each member of the Executive Council can coordinate the activities of the states in his circuit by dealing directly with the state chairmen. In the same manner the national officers could coordinate the activities of the Circuits by dealing directly with the Council members. The chairmen of the national committees can perform their functions by following a similar procedure.

Mr. Brown is supported in this recommendation by Cameron W. Cecil, Los Angeles, California, Council member for the Ninth Circuit. It is anticipated that this proposed addition to the by-laws will receive the careful consideration of the Council at the Annual Meeting of the Conference in St. Louis.

The highlight of the report of Council member from the Fifth Circuit, Randolph W. Thrower, Atlanta, Georgia, is the report of a circuit meeting held at Gulfport, Mississippi, in December, 1948, where an attempt was made to achieve coordination of effort in the Circuit and formulate plans for carrying forward the Conference program during the year.

The Fifth Circuit report also contained a recommendation intended to eliminate "lame duck" administrations in state organizations cooperating with the Conference. In support of this contention it is pointed out that the majority of State Bar Associations have their annual meetings during the spring or summer. Under the present system of appointments the newly-elected officers of the state junior bar groups would not be called upon to accept any conference appointments until January 1 of the year following their election. He believes that within each state the best results can be obtained by having the Conference chairman and his major appointees serve a term coinciding with the terms of the officers of state junior bar sections.

Specifically Mr. Thrower's recommendation reads as follows:

> That, whenever the practice is followed of appointing the president of a State Junior Bar Section as state chairman of the Conference, the policy be adopted of appointing the state chairman and other principal state appointees to serve for a term coinciding with the term of office of the officers of the State Junior Bar Section.

The immediate objection to this resolution, of course, is that it prevents the Conference from setting up any permanent nation-wide organization. This recommendation will undoubtedly receive the action of the Conference in conjunction with Mr. Brown's recommendation as outlined above.

The reports of other Council members indicate that great emphasis has been placed upon the Public Information Program and Law Student Activities in their Circuits.

The Inter-American Committee headed by William A. Gillen, Tampa, Florida, reported with pleasure that the main objective of the Committee since its formation in 1941 had been accomplished in that a committee of young lawyers having purposes similar to those of the Junior Bar Conference has been established in the Inter-American Bar Association. This goal was attained at the Sixth Conference of the Inter-American Bar Association held in Detroit, Michigan, May 22 to June 1, 1949.

In the report of the National Director of the Public Information Program, Lewis R. Donelson III, Memphis, Tennessee, it is stated that radio programs have been sponsored by the Conference in thirty-two states and the District of Columbia. The major new project of the national program has been the commencement of a series of dramatic scripts on the development of the American form of government. These scripts are being prepared through the cooperation of the School of Speech of Northwestern University. The underlying message of these programs will be to depict and explain in dramatic terms, by actual incidents from history, the important part that the law and lawyers have played in the development of our system of government.

The first meeting of the American Law Student Association will be held in conjunction with the Annual Meeting of the Conference in St. Louis, beginning on September 4.

Charles W. Joiner, Chairman of the Committee on Relations with Law Students, points out that the future of America depends largely on the legal profession, the future of the profession will depend largely upon the strength of the organized Bar, and the strength of the organized Bar will depend upon the quality of its members. He urges that our effort to interest those men and women who will be tomorrow's lawyers in the opportunities for improving the administration of justice through the organized Bar and the obligations to the profession and to the public to that end become of paramount importance. In conclusion, Mr. Joiner observes that without guidance and without knowledge as to its achievements, we cannot expect these young men and women to know what valuable contributions the organized Bar is making and to join with us to have a part in this important work. He encourages all members of the Conference to exert every effort to bring a closer relationship between the profession and the students.

Human Rights

(Continued from page 716)

relations between South Africa and India have been impaired; that the second merely expresses the opinion that the treatment of Indians in the Union should be in conformity with the international obligations under agreements entered into by the two governments and the obligations of the Charter; and the third paragraph requests a report to the General Assembly that measures have been adopted to this end. And so Wellington Koo says this amounts only to an offer of good offices, which of course is not intervention.

But the South African government denies that the Capetown Agreement, although acted on by it, is a binding contract, and claims that it is under no obligation to change its domestic laws. The resolution of the Assembly, by necessary implication, declares that it is.

Do the Charter's Freedoms Imply Right To Intervene?

Many practical questions are posed by this action. Under the fundamental freedoms of the Charter—assuming them to be legal obligations and not a mere statement of purpose—could any other nation, before the Bar of the United Nations, attack the caste system of India? Can Americans do business in the Central American and South American countries, and claim not to be subject to their laws? Can foreigners come to the United States, become citizens, and refuse to obey our school laws, building laws, health laws? If the declarations of the Charter are binding and enforceable, a vast field of inquiry opens up. Can general statements inserted in a treaty alter federal, state and municipal law in the United States and become the supreme law of the land? Does all this make for peace or war?

Does the Charter as interpreted by the Declaration of Human Rights which has been adopted by the Assembly really mean that women the world over have a cause of action for equal pay for equal work? Or that they are entitled to full civil rights with men the world over, under the international compulsion?

Lord Palmerston once pointed out the varying standards of criminal punishment in different countries when he described the following extreme examples:

> To have heavy stones placed upon one's breast and police officers dance upon them;
>
> To have one's head tied to his knees and be left for hours in that state;
>
> To be swung like a pendulum and bastinadoed as he is swung.

But if the criminal standards and processes are widely variant, social custom and economic status are still more widely separated in the different countries. The fundamental freedoms have not yet been fully attained in any one civilized country. Are we to win them within the states, members of the United Nations, by a resolution of the Assembly, like the International Declaration of Human Rights? Can domestic law be written for every nation by the medium of a treaty?

Many of these questions seem remote but they will inevitably arise. This one is before us now. Is it the proper duty of the Assembly of the United Nations, a legislative body, to decide legal questions of vast moment?

As Professor Briggs has pointed out, the passage of the resolution did not aid the Indians in South Africa. The judgment of the Court might have resolved the question, if it held the Capetown Agreement a binding international obligation. In the same way the political manipulations of the Council of the League of Nations did not help the German settlers in their case against Poland. The World Court could presumably have ordered restitution or money damages, but it was allowed to take the case only for advisory opinion, and its judgment was, in practical effect, nullified.

Of most concern to all of us is the fact that in this South African case some plain legal questions are presented: (1) Does the passage of the proposed resolution urged by India constitute intervention in the domestic affairs of South Africa? (2) Are the Capetown treaties binding? And, most important, (3) Do the human rights declarations of the Charter constitute a statement of purpose, or a binding obligation?

Questions Presented Are Legal, Court Should Decide

Only a court can decide these questions authoritatively; but partly because, as Dr. Koo said in debate, the Assembly was not sure that there would be a unanimous decision of the Court and felt that it was unfortunate to put such a heavy strain on that tribunal, the Assembly decided to enact the resolution which in effect gave judgment on a legal question.

We need to have the International Court of Justice subjected to strain.

It needs the strain and growth of deciding substantive international controversy. It needs to decide authoritatively the question posed by Mr. DeLaColina of Mexico when he says in the South African debate that no recommendations of the General Assembly touching any subject handled by the Charter can constitute an interference with the domestic affairs of any country. This clearly is a legal question, and is it true? Is it true, as asserted in the South African debate, that the Charter takes out of the realm of domestic jurisdiction the treatment of racial groups that have become citizens within a country and places them under international law, and is not this a legal question of the greatest moment? Only the upbuilding of law between the nations can effectively prevent war, and this law will not be built up unless clearly legal questions begin to be submitted to the court. I do not say that South Africa should win her case. I only say the International Court should decide the question.

In her eloquent address in support of the resolution Mrs. Pandit pointed out:

> We have given much thought to the problems arising from the invention of the atomic bomb which threatens the future of mankind. Yet we forget the forces generated by the maladjustment of human relations are perhaps equally powerful and an equal threat to the future of the world. The mind of man is more powerful than matter. The forces and feelings which move the minds of men are often more far-reaching in their effects than material forces. We must remember that, in the present case, the minds of millions of people in India and other parts of Asia and Africa have been moved by intense indignation at all forms of racial discrimination which stand focussed on the problem of South Africa. This is a test case.

But the desire for national freedom is just as keen a motive, just as powerful an impelling force. If the human rights declarations of the Charter do create enforceable obligations, then there will often be sharp conflict between them and the article on nonintervention. This is a conflict which, apart from war, can be resolved only by a court. And until the Court begins to resolve these questions, we shall not begin to establish a juridical world order.

Colorado v. Rawlings

(Continued from page 731)

dissented from the opinions of the four justices who determined what the law of the land was thenceforth to be. One wonders where the other two members of this nine-man court were, and what their opinions would have been had they been present. If they had agreed with the dissenting judges, of course, the law we would have now would be quite the opposite of what it is.

But this is idle reflection. There is no use complaining that the Supreme Court of the United States is wrong; I have to take my law from them and you have to take it from me.

Now you must have been asking yourselves what the difference is between a divorce and an annulment. There is no practical difference, except to lawyers and theologians, but the legal difference creates an interesting point in this case, so I shall explain it to you in as simple language as I can.

In the case of a divorce, the law admits the pair was married for a time and simply severs the bonds of matrimony. In the case of an annulment, the law says there never was a marriage; it is simply wiped out of past, present and future existence. Thus, if one were married and divorced legally, one would be a divorced person, colloquially called a divorcee, but if one's marriage were annulled, one would be regarded as single, the marriage, in law, never having occurred.

Defendant's Marital Status Differs from State to State

Now let us trace the marital peregrinations of the defendant from state to state and endeavor to determine his marital status, if we can, in each state. Of course, we are really concerned only with his status in Colorado, but it will be an interesting mental exercise to prepare us for our deliberations when we come to consider his status here.

All four states, of course, recognize the first or Colorado marriage. But since, as the defendant has told us, he established residence in New Mexico only for the purpose of obtaining a divorce there, and had no intention of residing there forever, he was not domiciled there, so the New Mexico decree is of no validity except in New Mexico. Consequently, his second marriage is bigamous, except in New Mexico.

His Utah divorce is invalid for the same reason, in Arizona, Colorado and New Mexico, but valid, of course, within the boundaries of Utah.

His two annulments are likewise valid in Arizona but have no legal effect anywhere else.

Are you following me, ladies and gentlemen?

So Arizona law says he was married, illegally divorced, bigamously married, illegally divorced again and then had both marriages legally annulled. In Arizona, therefore, the defendant is a single man.

Please pay attention, ladies and gentlemen; this is important.

New Mexico law says, however, that he was married, legally divorced, legally remarried, illegally divorced and both marriages were illegally annulled. In New Mexico, then, he emerges as a married man, married to his second wife.

You see, ladies and gentlemen, how logical the law of each state is.

Utah law says, on the other hand, that he was married, illegally divorced, bigamously married, legally divorced from a bigamous marriage, if such a thing can be, but perhaps it cancels out the bigamy, who knows? Thank Heaven, I don't have to decide that. Then both his marriages were illegally annulled.

Hence, whatever the result of the second divorce, he is in Utah a married man, married to his first wife.

Usher, open those north windows, please! It is very warm and the members of the jury are getting drowsy.

Colorado law says he was married, illegally divorced, bigamously married, illegally divorced and both marriages were illegally annulled. So it would appear he is a bigamist in Colorado.

Defendant Could Be Legally Wed to Two Women at Once

Is this not indeed a remarkable state of affairs? The unfortunate defendant is single in one state, married to one person in another, married to somebody else in a third and bigamously married in a fourth. Every time he walked on to his Colorado property, blameless and innocent before, he became a bigamist. He could thus commit the crime of bigamy a hundred times a day, and probably has. Yet in the bordering State of Utah, his lawful wedded wife is Anna Judith Wilkes, while in New Mexico, it is to Bessie May Dunscombe that he owes his matrimonial fealty.

Indeed, there would be nothing repugnant in law if the defendant were to take back both wives, install the first Mrs. Rawlings in the Utah bedroom and the second wife in the New Mexico bedroom and live with them both. Even if he were prosecuted in Arizona or Colorado for adultery with one or the other or both his wives, he would have perfectly valid defenses: first, the prosecuting state would have no jurisdiction since the alleged offense would have taken place in another state; and second, the alleged partner in his shame would be his lawful wife in the state in which it would be alleged the offense took place.

If my instructions to you, ladies and gentlemen, are construed by the immoral to be a legal blue-print for the establishment of perfectly legal plural marriage, or if it is realized by the wicked and sinful classes of our country that it is both theoretically and in practice quite possible for any man to have a different lawful wife in each one of the forty-eight states, that cannot be helped; it is no concern of ours. That is the law, not only in Colorado, but in every state of the union.

Throughout my instructions to you, ladies and gentlemen, I have used the words "bigamy" and "bigamous" in their nonjuridical sense, or perhaps I should say somewhat loosely, because it must be obvious to you that no one is a bigamist until he has been convicted of bigamy. Whether or not Herman John Rawlings is a bigamist, it is your duty and yours alone to decide.

But before I leave the matter with you, I must impart to you three cardinal principles of our criminal law by which you are obliged to abide.

First, you should not convict the defendant unless you are satisfied that he had a guilty mind, or criminal intent. But assuredly, he knew what he was doing when he married for the second time. That is to say, he was not suffering any mental infirmity or incapacity. Second, ignorance of the law is no excuse; therefore, the defendant must be presumed to have known the law and known consequently that he was contracting a bigamous marriage. Third, if you have a reasonable doubt of the defendant's guilt, you must acquit him, but how you possibly could, after what I have told you, would be utterly beyond my comprehension.

Ladies and gentlemen, I leave the matter in your hands and I am confident that you will see to it that justice is done.

Federal Health Insurance

(Continued from page 734)

statement further reflected the conviction that the enactment of this bill would attain these objectives and that its adoption was "the only way we know of to avoid socialized medicine."

During the course of the hearings on the bill before the Senate and House committees, which commenced the latter part of May, representatives of the medical profession, on the other hand, characterized the program suggested by Title VII as constituting "an extreme example of compulsory paternalism, wrong in principle, impossible of practical operation, and contrary to our established ways and habits of life and political principles." These representatives further stated that the bill would concentrate additional power in the central Government, would absorb in Washington functions much better retained locally, would greatly increase the over-all cost of providing health services and would lead to a widespread and serious deterioration of the quality of medical care.

At the time these comments are being prepared, it seems reasonably certain that no definitive action will be taken on this bill during the first session of the 81st Congress. Further hearings are contemplated during the course of which alternate proposals will be given consideration, including the Taft Bill (S. 1581) which would, among other things, provide federal funds to enable the states to develop their own plans for providing medical care for those of their citizens unable to purchase the care for themselves, the Hill Bill (S. 1456), which would make available to the states federal funds to provide needy persons with service cards in voluntary prepayment medical and hospital care plans, and the Flanders-Ives Bill, introduced May 31 as S. 1970, and its companion House bill, which would, among other things, provide federal assistance to enable voluntary prepayment health service plans to make their services generally available in the communities that they serve at charges based on the income of the subscribers.

Survey of the Profession

(Continued from page 750)

Additional Topics As Yet Unassigned

In addition to a substantial number of previously conceived topics, several new topics have not, up to this writing, been assigned. They are:

(Division III)
- Appointment and Election of Judges

(Division IV)
- Professional Skills and Legal Education
- Legal Education for Public Service
- Legal Scholarship

(Division V)
- Medical Analogy

In an enterprise as large and as aspiring as this Survey it is probable that other reports will be added to the above. As always, suggestions as to reports and offers of assistance are welcome. Several of our best Survey ideas and workers arrived in our midst by this route.

Wide Distribution of Reports Is Essential

In order to obtain the cooperation and the criticism the Survey needs if our venture is to realize its immense possibilities, the reports are circulated as widely as possible.

For example, copies of the article on the English legal assistance plan were sent to 1500 newspapers, 150 legal periodicals, all the state and major local bar associations. A number of bar association presidents are using it in their annual addresses.

The law reviews at Yale and Wisconsin intend to reprint it. The editors of several bar association periodicals and legal newspapers, including the *Massachusetts Law Quarterly* and the *Journal of the Bar Association of the District of Columbia*, either have already published it or plan to do so soon.

A radio round-table about the Survey went on the air from Boston in June over the Yankee Network. Ten transcriptions of this forum, one of whose participants was Erwin N. Griswold, Dean of the Harvard Law School, are now being sent around the country to various members of the Public Information Program of the Junior Bar Conference.

President Holman's speech about the Survey was broadcast on the coast to coast network of the Columbia Broadcasting System last fall. Five thousand transcripts of his talk were circulated, largely to bar associations and newspapers.

Publicity about the Survey and its reports helps the public and the Bar as we go along and paves the way for our ultimate summing-up.

Chief Justice Vanderbilt

(Continued from page 743)

1939). In 1938 Arthur Vanderbilt was appointed Chairman of the National Committee on Traffic Law Enforcement. The following year he became the third president of the highly influential American Judicature Society, whose previous presidents were former Chief Justice Charles Evans Hughes, and former Secretary of War Newton D. Baker. In 1939 Attorney General Murphy appointed him a member of the Attorney General's Committee on Administrative Procedure. This committee did extensive work and in 1946 its efforts culminated in the enactment of the Administrative Procedure Act (60 Stat. 237, 5 U.S. C.A., Sections 1001-1011; June 11, 1946). It has been widely hailed as a great advance in administrative agency reform. The Act incorporates the views of the minority members of the Attorney General's committee, Judge Groner and Messrs. McFarland, Stason and Vanderbilt. It was passed by both houses of Congress without a dissenting vote, and President Truman's signature made it unanimous!

Became Director of Survey

In 1941 Chief Justice Hughes named him Chairman of a Committee to Draft Rules of Procedure in Criminal Cases in the United States Courts, an experience which well qualified him for his 1948 task of drafting the new court rules in New Jersey. In 1946 Secretary of War Patterson made him Chairman of the War Department Advisory Committee on Courts Martial. Some of the recommendations of this committee were accepted in the Elston Law (H.R. 2575) enacted in June, 1948;[19] but much more remains to be done. Also during 1946 he was named Director of the Survey of the Legal Profession sponsored by the American Bar Association and the Carnegie Foundation, a post he later relinquished to Reginald Heber Smith of Boston.[20] In 1947 came his appointment as Chief Justice of New Jersey, as Governor Driscoll then said, "in order that a man of his extraordinary experience as a lawyer, student of jurisprudence, judicial procedure, and judicial structure, may be available" for the office of Chief Justice.[21] He found time during this very busy past year to deliver at Michigan Law School in April the 1948 William W. Cook Lectures on American Institutions entitled "Men and Measures in the Law".

19. The Act has been criticized as not going far enough. Editorial, "Courts-Martial Reform Has Been Delayed", 34 A.B.A.J. 702; August, 1948. See editorial, "Improving Military Justice", 33 A.B.A.J. 45, January, 1947; "Military Justice: Comments on Advisory Committee's Report", 33 A.B.A.J. 284-286, March, 1947; "Military Justice: Association Urges Check on Command Control", 34 A.B.A.J. 288, April, 1948.

20. See 33 A.B.A.J. 423, May, 1947; *id.* 1075, November, 1947; 34 *id.* 18, January, 1948; *id.* 437, June, 1948.

21. 33 A.B.A.J. 1216; December, 1947.

His Concept of Law Schools in a Changing Society

After serving on the faculty of New York University Law School for almost thirty years, Arthur T. Vanderbilt succeeded Dean Sommer as its head in 1943. He served in this capacity until 1948 when he retired to assume his judicial duties. On June 9, 1948, the University conferred on him its seldom-bestowed degree of Doctor of Civil Law of New York University in recognition of his contributions to the law school.

The period of his deanship was marked by substantial progress at the law school. "The mark of an educated man," said Dean Vanderbilt, "is the ability to act on the basis of all the available evidence at the moment when action is indicated."[22] To attain this standard among lawyers, he believes it is the function of our colleges and law schools today to develop leaders—particularly leaders in the field of government.

> We are simply endeavoring to adapt the best experience of our own past and the best practice of our contemporaries to the training of our students as prospective members of a learned profession that, more than any other group in the country, must bear the responsibility for adapting the law to the needs of the social order in which they must live and in which they should be leaders.[23]

He believes that leadership requires self-control, vision, assumption of responsibility, wisdom, the greatest possible development of a man's individuality and the greatest possible harmonious development of his powers. Leadership requires devotion to the instant task, the ability to adapt the spirit of the times to the best possible uses, and a knowledge of human nature.[24] He has urged upon the young lawyers of the American Bar Association the heroic spirit of Holmes, "to think great thoughts," which he regards as the great task of young men:

> . . . there is no way in which you can do more to preserve this heritage of the past than by lending your intelligence and your strength to the improvement of the administration of justice, for I venture as my deepest conviction in the field of public life that, if our American form of government should fail, it will be because we have neglected our responsibilities for perfecting the processes of justice in our traditional courts, in our newer administrative tribunals, and in our legislatures which were the source of the administrative tribunals.
>
> It is a difficult task. It calls for intelligence to see the problem, and courage to solve it. . . .
>
> More and more am I coming to believe that it is the task of young men.[25]

Dean Vanderbilt believes deeply that the law schools must train our young men to take a more active rôle in politics and in public affairs.[26] He has assisted and encouraged young men in this direction.

As Dean of New York University Law School, he made substantial progress in improving legal education. During his deanship he broadened the scope of activities of the law school so that in 1947-48 it had 461 out of the 1017 graduate students studying in the 101 approved American law schools. These students came from 63 different law schools and took 57 different courses.

He Is the Father of the "Law Center"

He was the originator and guiding genius of "the idea of a Law Center".[27] Merely training law students to pass bar examinations is not the function of a law school, he believes. The modern lawyer must not only know what the law is and what it has developed from; he must also be able to advise what in the light of future economic, political and social trends it probably will be in the reasonably anticipated future. He feels that the colleges have a large rôle to play in the education of future lawyers with these educational objectives in view.[28]

The Citizenship Clearing House is an integral part of the new Law Center at New York University School of Law.[29] The American Bar Association Committee on Participation by Lawyers as Citizens in Public Affairs cooperated in its installation exercises. Institutes on current legal problems of outstanding significance are presented where distinguished experts give their views authoritatively, yet informally and practically. Institutes have been held on a variety of subjects including the renegotiation of war contracts, employees' pension funds, a unified transportation system, money and the law (a study of legal aspects of the Bretton Woods Conference), the new Federal Rules of Criminal Procedure and on Professor Rudick's proposal for an accession tax. The transcripts of these conferences or Institutes have been issued in the *New York University School of Law Institute Proceedings.*

The Law School has expanded its list of publications in recent years. In addition to the well-known *New York University Law Quarterly*, the school also publishes the *Tax Law Review*, the *Intramural Law Review* and the *Bulletin of New York University School of Law.* The *Tax Law Review* has the largest circulation of any law review in the country. The Dean was the inspiration and founder of the *Annual Survey of American Law.* Roscoe Pound, Dean-Emeritus of the Harvard Law School, has recently published a monumental

22. Commencement address given June 23, 1946, at Wesleyan University of whose Board of Trustees Dr. Vanderbilt was then chairman.

23. "Leadership and the Law School", address by Dean Vanderbilt at the Fifty-Seventh Annual Dinner of the Alumni Association, January 25, 1944; "The Responsibility of the Colleges for Government," address by Dean Vanderbilt at the University of Pennsylvania.

24. Centennial Address by Arthur T. Vanderbilt, '10, on the occasion of the One Hundreth Anniversary of the Founding of the Mystical Seven Society of Wesleyan University, Middletown, Connecticut, June 18, 1937.

25. "The Task of Young Men in a Changing World", address before the Junior Bar Conference, July 24, 1938, reprinted in 24 *A.B.A.J.* 716, 716-717, September, 1938.

26. Arthur T. Vanderbilt, "Better Minds for Better Politics", *The New York Times Magazine*, March 9, 1947, page 10.

27. "The Idea of a Law Center", address by Dean Vanderbilt on the occasion of the New York University Law Center Celebration Dinner on September 26, 1947, at the Grand Ball Room of the Waldorf-Astoria Hotel, New York, New York; "The Law School in a Changing Society: A Law Center", 32 *A.B.A.J.* 525, September, 1946.

28. See the masterly report of the Vanderbilt Committee on Prelegal Education presented to the Section of Legal Education and Admissions to the Bar of the American Bar Association on September 12, 1944.

29. See Conference on the Citizen's Participation in Public Affairs, published by the New York University School of Law, January, 1948, on the occasion of the inauguration of the Citizenship Clearing House.

review of the 1944 volume in this JOURNAL.[30] A companion work was recently inaugurated entitled the *Annual Survey of New York Law,* limited to the developments in that state. Through the New York University Press, the Law School has taken over the publication of the *Judicial Administration Series,* which is sponsored by the National Conference of Judicial Councils.[31] Also inaugurated recently was the *New York University Law School Legal Series.*[32]

The new Law Center is active in more expansive fields. An Inter-American Law Institute was recently formed in which the leading subjects of the common law and the civil law may be studied on a comparative basis at graduate level not only under the direction of instructors from the United States, but also under visiting professors from Central and South American law schools. It has just finished its first year with fifteen students from Latin America, all of whom were college and law school graduates, and over half of whom have since assumed important governmental positions in their native countries. The Law Center includes an invaluable Institute of International Law. It will provide opportunities for graduate legal research as well as post-admission education facilities for the practicing lawyer. Probably the most important function of the Law Center will be the development of round-table conferences in which the most thoughtful of our judges, legislators, law school professors, social scientists and business representatives can work on and work out the complex legal problems besetting our American life today. The "idea of a Law Center" has caught on and similar institutions are being developed at the University of Illinois[33] and at Southern Methodist University in Dallas, Texas.[34] By some the Law Center concept is regarded as the most progressive idea in legal education since Dean Langdell introduced the case system at Harvard in 1870.

Dean Vanderbilt also found time during these busy years to be an author.[35] His scholastic attainments have not gone unhonored.[36] It will not be necessary, although he has resigned the deanship, for him to sever all connections with New York University. Dean Vanderbilt has been elected to the Council, which is the governing body of New York University, and made Chairman of its Committee on the Law School.

A Personal Glimpse Reveals Modesty

A man's work is his best memorial. Despite the great accomplishments of New Jersey's new Chief Justice, he does not regard himself as unusual. He has been active for more than a quarter of a century in politics, yet he has never found it necessary to indulge in any of the personal political mannerisms which are frequently associated with American political life. He has been described as a somewhat tight-lipped, aloof personality, but with a manner which is suave and courteous, yet at the same time wary, cool and skeptical. He does not smoke or drink, but is most companionable and relaxed in private conversation. His discourse contains flashes of keen wit and pointed humor.

He begins his office day at 8:00 A.M. "From 8 to 9 in the morning," Vanderbilt once said, "I can get a day's dictation done because there are no interruptions." His working day ends whenever the chores are done. Seldom does he go home without a brief case full of work, a habit he insists he is trying to break. For relaxation on pleasant evenings, he drives for an hour over the back roads of nearby Morris County with Mrs. Vanderbilt. Then he reads history in his spacious study until bedtime. He also finds amusement in the theater, in dancing, and, of course, reading. His summer home in Maine affords him opportunities each year for long walks through the woods, for sailing and swimming which he enjoys, and for much reading.

Working in his law office has always been a coveted honor sought by young New Jersey barristers. His long association with the young men in his law office (which soon would have included his twin sons, both lawyers) he said "is really one of the hardest things for me to give up."

The secret of his professional success has been his quiet way of doing business, with little fanfare and no vainglory. He has a genius for organizing himself and his staff so that there is no waste of time, talent or energy. The major steps in the office were always planned by "A. T." and the details filled in by those in whom he had confidence. To him, wasting time is a crime. Often, when on his way to a Washington conference, he dictates on the train. He goes on to the conference, and his secretary takes the next train back. He reads the week's newspapers on Sundays, which is "catch-up" time for him, because he can then read each day's developments in sequence.

Vanderbilt Family Now Has Six Lawyers

Not the least of his loves is his family. Father of three girls and twin boys, he now is the proud grandfather of five grandchildren, whom he thoroughly enjoys. Mrs. Vander-

30. 33 A.B.A.J. 1093, November, 1947; *id.* 1191, December, 1947; 34 *id.* 31, January, 1948; *id.* 117, February, 1948. Dean Pound's 30,000-word review has been called, "the survey of the Survey!" The 1948 volume is dedicated to Dean Vanderbilt.

31. The following have already appeared in this series: Orfield, *Criminal Appeals in America* (1939); Pound, *Organization of Courts* (1940) and *Appellate Procedure in Civil Cases* (1941); Warren, *Traffic Courts* (1942); Haynes, *The Selection and Tenure of Judges* (1944); and Orfield, *Criminal Procedure from Arrest to Appeal* (1947).

32. The first volume in this series is Professor Albert Kocourek's Jurisprudence.

33. Harno, "A Law Center in Illinois: Plans and Dreams for the 'Mind's Eye'", 34 A.B.A.J. 464, June, 1948.

34. "Southwestern Legal Center: Plans Announced to Establish It at Dallas", 34 A.B.A.J. 121, February, 1948.

35. *Studying Law,* edited by Arthur T. Vanderbilt (N. Y. 1945); McFarland and Vanderbilt, *Cases and Materials on Administrative Law* (Albany 1947); *Men and Measures in the Law* (N. Y. 1949).

36. Chief Justice Vanderbilt holds the honorary degree of Doctor of Laws from Tulane, Wesleyan, Western Reserve, British Columbia, Tusculum, The American University, University of Michigan, Northeastern University, University of Pennsylvania, Rutgers, as well as the degree of Doctor of Civil Law from McGill University, Boston University and from New York University. See 25 *Who's Who in America* (1948-1949) 2535.

bilt points out that with *six* lawyers now in the family,[37] she must quietly insist that there be no legal arguments around the family table!

At the time of his appointment to the Bench in November, 1947, he was heard to remark as he closed his Newark law office door behind him, "It's going to be hard to get out of this old place."

Since leaving private practice and assuming judicial office, Chief Justice Vanderbilt has piloted a monumental procedural reform in the past two years in New Jersey. This achievement demonstrates the virtue of what he has long advised: the value of common counsel.[38] The new 1947 Constitution represents the first real revision in the century-old structure of New Jersey's antiquated judicial system. The fundamental changes in its court accomplished by the new Judicial Article, Article VI, were ably outlined last year in the JOURNAL.[39] Modernization and simplification of both structure and rules will inevitably result. The pattern of the federal courts has in the main been followed.

Among the important new provisions is the one which makes the Chief Justice of the Supreme Court the administrative head of all the courts in the state.[40] The Supreme Court is given power to make rules governing the administration, practice and procedure of all the courts in the state, as well as jurisdiction of admission to the practice of law and the discipline of persons admitted.[41] It was to this latter task that the Court and the new Chief Justice devoted a good portion of their work in 1948. This job was a prodigious one.

The Court followed the practice of taking "common counsel." On or before May 15, 1948, the Court received from bar associations, judges, law teachers, public officials, individual lawyers, interested civic groups, newspaper editors and citizens of the state their suggestions for improving "Jersey justice". As a result of this truly democratic process, the Court issued on June 21, 1948, *Rules Governing the Courts of the State of New Jersey* which became effective on September 15, 1948, the effective date of the new Judicial Article.[42]

This accomplishment would have been impossible were it not for the availability of the Federal Rules of Civil and Criminal Procedure, in the formulation of which the new Chief Justice shared so large a part. His painstaking, patient, persistent work has born fruit in the democratic way he has long advocated. His accomplishments were recognized by Rutgers University in 1948 when President Robert C. Clothier conferred the honorary degree of Doctor of Laws on Arthur T. Vanderbilt.[43]

His Opinions Already Display Judicial Keenness

The opinions of a judge over a single year do not furnish an adequate basis from which to predict the breadth and depth of his judicial mind, but they do give us a simple means which permits us to test its quality. Working under a new State Constitution, Chief Justice Vanderbilt revealed his approach to questions of public law in several opinions. In *State* v. *Traffic Telephone Workers' Federation of New Jersey*,[44] he upheld a state statute prohibiting strikes and lockouts and prescribing compulsory arbitration in public utilities against a variety of attacks, but declared it unconstitutional in failing to set forth any standards to guide the arbitrators in the exercise of their delegated legislative power, a defect which the legislature promptly cured.[45] In *Seawell* v. *East Orange*, not yet reported, the Chief Justice announced the policy of the Court to refrain from passing on constitutional questions in the absence of a full hearing on the merits, especially where it was developed at the oral argument that the officials who purported to speak for the municipality were without authority to do so. In another case, where a borough commission assumed to act as an individual might, without regard to statutes or established practice, their action in leasing municipally owned real estate was set aside.[46] In *Kimberly School* v. *Town of Montclair*,[47] a line of cases imposing restrictions not within the statute on tax-exemption was overruled and the false gloss on the statute removed so as to give effect to the plain legislative intent. In *Duffcon Concrete Products* v. *Borough of Cresskill*,[48] it was held that a small residential community might properly enact a zoning ordinance that made no provision for heavy industry, where there were ample facilities for heavy industry within the geographical region, though not within the particular municipality, thereby making intelligent municipal planning possible.

A Strong Advocate of Separation of Powers

Chief Justice Vanderbilt has had no difficulty in reconciling full respect for the doctrine of the separation of powers, which was reaffirmed in the

37. Jean Althen (Mrs. Christian L. Swartz of Arlington, Virginia) is a lawyer, as is her husband. Virginia Elizabeth (Mrs. Lemuel Bannister, Jr., of New York, New York) is married to a lawyer. Lois Dorothy (Mrs. George C. Brainard Jr.) married an engineer. The Chief Justice's twin boys, Robert and William, are both lawyers.

38. Address, "The Present Day Significance of the Federal Constitution", delivered at Exeter, Massachusetts, June 21, 1938, reprinted in 24 *A.B.A.J.* 516-517, July, 1938.

39. English, "State Courts: New Jersey Reorganizes Its Judicial System", 34 *A.B.A.J.* 11; January, 1948. See also, 33 *A.B.A.J.* 1216; December, 1947.

40. New Jersey Constitution, 1947, Art. VI, § VII, Par. 1.

41. *Id.*, Art. VI, § II, Par. 3.

42. The work on the new Rules is reviewed in detail in an article, "Rules for New Jersey Courts: Bar and Public Assist Judicial Rule-Making", 34 *A.B.A.J.* 445; June, 1948.

43. A portion of that citation reads: "To you, more than to any other person, belongs the credit for stimulating and guiding the movement for judicial reform in New Jersey, happily brought to fruition in the revised constitution of 1947; to you, more than to any other person, will fall the task of implementing this reform through your responsibilities as Chief Justice of the new Supreme Court. Long accustomed to your rare ability to discharge several full time tasks concurrently as distinguished lawyer, creative educator, capable political leader and devoted civic servant, the citizens of New Jersey are assured of the future of Jersey justice under your direction."

44. 2 N. J.—(1949).

45. P. L. 1949, c. 308. This decision, the *New Jersey Law Journal* observed, "will undoubtedly carry influence in other states having compulsory arbitration statutes," 72 *N. J. L. Jour.* 224 (1949).

46. *Anschelewitz* v. *Borough of Belmar*, 2 N. J. 178, 65 A. (2d) 825 (1949).

47. 2 N. J. 28 (1949).

48. 1 N. J. 517 (1949).

new state constitution, with the effective utilization of the administrative process, so long as the right of full judicial review guaranteed by the new constitution is respected. *Mulhearn* v. *Federal Shipbuilding & Drydock Co.*,[49] bids fair to become a landmark in the constitutional boundaries of administrative law.

The Chief Justice's views on procedure have long been known. While basic procedural rights such as adequate notice and hearing are as vital as any substantive rights and must be vigorously enforced by the Court, and while the purpose of pleadings is to disclose the issues in controversy, nevertheless procedure is merely a means to an end and not something to be glorified in and for itself. It should have come as no surprise that in his first opinion in a case seeking to reverse a judgment setting aside a fraudulent decree, on the clear facts before the reviewing court the Chief Justice not only sustained the trial court but did complete justice by decreeing a deed absolute on its face to be a mortgage, treated the mortgage as foreclosed and ordered a sale of the property—steps which under the old practice would have consumed from three to five years and would have been correspondingly expensive and futile.[50] In another case, however, involving property of considerable magnitude, he declined to tolerate an announced intention to seek an amendment, which did not disclose what the amendment was even up to the entry of judgment and restated the fundamentals of sound pleading for the guidance of the Bar.[51]

In the first case under the new state constitution raising the question as to when a litigant was entitled to a trial by jury, Chief Justice Vanderbilt applied the historical test of what had been the scope of jury trials under the earlier constitution,[52] thus giving full force to the constitutional mandate that the right to trial by jury should remain inviolate, but avoiding the problems which have plagued the federal courts in this field.[53] The Chief Justice's liberal attitude toward the rules of evidence is illustrated in the only opinion he filed during the year in which he did not speak for the court, and where he favored the admission in evidence of a written declaration of a decedent who had personal knowledge of the transaction in question and wrote in good faith before the controversy arose, this view being in line with the opinions of Wigmore and other modern authorities in this field.[54]

Chief Justice Vanderbilt's many years of teaching equity and trusts, as well as his long years of active practice, are reflected in his decisions in these two fields. In two cases he reversed the efforts of chancery to invade the field of labor relations, holding that equity had no inherent jurisdiction over the relationship of employer and employee.[55] A testamentary direction to invest in legal securities he held precludes a trustee from accepting from himself as executor anything but legal securities or cash.[56] He took the position that under statutes providing for the voluntary liquidation of corporations, the directors become statutory trustees and are liable for losses ensuing from continuing the business of the corporation.[57] The case of *Mesce* v. *Gradone*[58] gave the Chief Justice an opportunity to choose between two lines of conflicting cases and to clarify the law of equitable merger in New Jersey, holding that there is no merger of legal and equitable interests under a trust where one or more of several beneficiaries is or are also a trustee or trustees.

If one year is too short a time in which to make an adequate appraisal of Chief Justice Vanderbilt's judicial ability, promising though it is, it does furnish a sufficient period in which to judge his administrative skill. The results speak for themselves. On June 30, 1949, when the Supreme Court rose, it had heard and disposed of *every appeal* in which the briefs were available. It had exceeded the output of its predecessor court by 50 per cent and it had handed down its opinions in one-quarter of the time. These results were attained by these simple devices: every cause was argued orally; every Justice read the briefs and as much of the records as necessary in advance of the oral argument; oral argument was heard only one day a week and three days later the court, having meantime reviewed the cases in the light of the arguments, met to confer on the cases preliminary to their being assigned for the writing of opinions. This method of dealing with a few carefully argued cases each week not only speeded the decisions but improved their quality.

The Appellate Division of the Superior Court, the new intermediate appellate tribunal, using the same methods, likewise has the unprecedented record of clearing its docket of ready appeals. It heard 268 appeals during the year, disposing of 70 per cent more cases than its predecessor court in approximately one-third of the time.

The trial divisions of the Superior Court had a very heavy back-log of cases, and so did not clear their dockets as the appellate courts did, but they made an impressive record. The Law Division disposed of 98 per cent more cases than its predecessor courts. It is expected that its work will be current in another year. The Chancery Division is substantially up to date with its work, each Chancery Judge's present work-load averaging only sixty-four cases. The County Courts have increased their productivity by 77 per cent, and they too will be abreast of their work in another year. In all of these courts there was an extremely small number of reserved decisions as of June

49. 2 N. J.—(1949).

50. *Scott* v. *Stewart*, 1 N. J. 62 (1948). The *New Jersey Law Journal* greeted this decision as ushering in a new day in the practice of the state. 71 *N. J. L. Jour.* 400 (1948).

51. *Grobart* v. *Society for Establishing Useful Manufactures*, 2 N. J. 136 (1949).

52. *Steiner* v. *Stein*, 2 N. J.—(1949).

53. *Morgantown* v. *Royal Insurance Co.*, 337 U. S. 254 (1949).

54. *Robertson* v. *Hackensack Trust Co.*, 1 N. J. 309 (1949).

55. *Schlenk* v. *Lehigh Valley Railroad*, 1 N. J. 135 (1949); *Coyle* v. *Erie Railroad*, 1 N. J. 358 (1949).

56. *Dickerson* v. *Camden Trust Co.*, 1 N. J. 468 (1949).

57. *Matawan Bank* v. *Matawan Tile Co.*, 2 N. J. 116 (1949).

58. 1 N. J. 164 (1948).

30, 1949, all of which have been or will be disposed of before the opening of the new term in September. These results in the trial courts have been attained primarily by the compulsory use of the pretrial conference in all cases except matrimonial cases, and secondarily, by bringing in a "task force" of extra judges to overcome calendar congestion in the urban counties.

Back of this impressive record of the New Jersey courts under its new constitution are three other factors: the rule-making power of the Supreme Court; the power of the Chief Justice to assign the Superior Court and county judges; and his constitutional authority as "the administrative head of all the courts in the state", which he is authorized by the Constitution to exercise through an Administrative Director of the Courts of his own selection.

The courts are the only organizations in the world that have been expected to work without supervision, without work records or statistics, and without power to assign their personnel to the places where most needed. New Jersey is the first state to deal with these problems comprehensively and it has wisely done so in its constitution. From now on, if the New Jersey judicial system does not work, the public will be justified in laying the blame at the doorstep of its Chief Justice. If it does work well—and it does—everyone connected with the system is entitled to his share of the credit and the Chief Justice is delighted to see him get it.

The gathering of statistics where none have been kept before, the maintenance of standards which have heretofore been left to an individual's sense of duty or conscience, the providing of adequate court facilities and staffs for several hundred judges in twenty-one counties cannot be done by the Chief Justice personally if he is to perform his duties as a judge and write his share of the opinions. It is to the Administrative Director of the Courts, Willard Woelper, and his staff that the Chief Justice must look for the day-to-day operations of the new judicial system in New Jersey.

There have been other impressive improvements within the judicial system during this past year. Bar examinations have been so improved that the results are handed down within three weeks instead of five months as in the past. The supervision of character committees has been strengthened. A new system of court reports in which each decision is preceded by a concise synopsis giving the scope of the entire case and keyed to the West Key Number System is among the innovations. There have been many forward steps, but the new Chief Justice would be the first to admit that the millennium is not yet in sight.

Arthur T. Vanderbilt was indeed the "logical choice" to inaugurate the improved judicial system of New Jersey. In an address to the largest gathering of Bench and Bar of New Jersey ever held, he confided concerning the new court:

> It is our ambition to be known as an industrious court, an efficient court, a just court, and, I hope, a friendly court.[59]

For his memorable work in the whole field of judicial and administrative improvement, the new Chief Justice of New Jersey received a fitting award in 1948. At the Annual Meeting of the American Bar Association in September, 1948, he was awarded the American Bar Association Medal for "conspicuous service in the cause of American jurisprudence"[60] a fitting tribute to one of America's great barristers.

59. 2 *Rutgers Univ. L. Rev.* 1, 33 (1948).
60. 34 *A.B.A.J.* 904; October, 1948.

Ancient Roots of the Law

(Continued from page 747)

certain industries out of central areas.[46] And when Billy noticed in his contract the words "entered into in duplicate" he didn't know that this phrase and the device of duplicates for the parties had been resorted to in Persia about 500 B.C.[47] and in Egypt in the fourth century B.C.[48]

Roman Law of Negligence Similar to Ours

When Billy was on the way to inspect his building his car collided with that of a state policeman. He was tagged for violating a traffic ordinance. So he might have been punished for a violation in ancient Rome of the *Lex Julia Municipalis* of 45 B. C. That provided, for example, that "on the roads which are or shall be within the City of Rome or within the limit of continuous habitation [like the 'built-up portions of said city' in some codes of today], after the first day of January next following, no one shall be allowed in the daytime, after sunrise or before the tenth hour of the day, to lead or drive any heavy wagon."[49] Billy's car was damaged and the state policeman was guilty of negligence in accordance with principles similar to those laid down in Roman law. Today we generally use as a standard the "reasonably prudent man". The Romans used as standards of what we would call negligence, the degree of care which "a careful, sound man of business" would use or "one in his own affairs" or in other cases, "any fool". They also recognized a doctrine denying relief for negligence to one who was himself negligent, a doctrine similar to the modern rule of contributory negligence.[50] In English law however, negligence and contributory negligence were not fully developed until the beginning of the nineteenth century. But the development made marked progress how-

46. 3 *Encyc. Soc. Sci.* 482. Finley, *Thucydides* (Cambridge 1942) 71.
47. Wigmore, *Panorama* 26.
48. *Id.* at 26.
49. *Id.* at 377-380. There were certain exceptions in the law. Pellison, *Roman Life in Pliny's Time* (N. Y. 1897) 126; Fowler, *Social Life at Rome in the Age of Cicero* (N. Y. 1924) 55, 245.
50. 8 Holdsworth 459; 1 *id.* at 331; 11 *Encyc. Soc. Sci.* 328. See however, Plucknett at 280-284, and Buckland and McNair, *Roman Law and Common Law* (1936) 284-291.

ever in a case decided in 1676,[51] and in some situations grew out of or was related to the action of trespass which originated at least as early as 1254.[52]

Billy was unable to sue the state. For the American state took the place of the English king as sovereign at the American Revolution, and the King could not be sued according to the rule established before 1250. That rule has been related to the theory that "the King can do no wrong." It flowed from the fact that no feudal lord could be sued in his own court, and the King was the fountain of justice. How could he hale himself into his own court or punish himself? So it is that judicial processes in England today run in the name of the King, just as in the United States they are in the name of the state.[53]

Modern Banks Take Notes Similar to Those of Babylon

Billy needed to borrow some money. So he gave a mortgage loan company his promissory note using a form somewhat similar to one payable to bearer in 2100 B.C.: "5 shekels of silver at the usual rate of interest, loaned by the temple of Shamash and by I. C. and Co. to I. Din and his wife, are payable with interest on sight of the payers at the market-place to the bearer of this instrument."[54] For this note Billy received the loan company's check drawn on its bank, which proudly carried on its stationery and on the portico of its skyscraper home "Founded 1874". He didn't know that banking was highly developed in ancient Babylon and that one of the greatest banking houses in history, the house of Yegibi or Jacob and Sons, extended continuously for the four centuries from 700 B.C. to 300 B.C. Among its records we find a note payable to order in 500 B.C. and a partnership contract in the reign of Darius.[55]

Billy's note to the loan company was guaranteed by others as might have been the case in Babylon,[56] and he further secured his note by a real estate mortgage as was done, for example, by the following mortgage made in 551 B.C.:

> A house belonging to Nebo-Akhi-iddin, the son of Sula, the son of Egibi, which adjoins the house of Bel-nadin, the son of Rimut, the son of the soldier (?) has been handed over (by Nebo-Akhi-iddin) for 3 years to Nebo-yukin-akhi the secretary of Bel-shazzar, the son of the king, for 1½ manehs of silver, sub-letting of the house being forbidden, as well as interest on the money. (Nebo-yukin-akhi) undertakes to plant trees and repair the house. At the expiration of the 3 years Nebo-akhi-iddin shall repay the money, namely 1½ manehs, to Nebo-yukin-akhi, and Nebo-yukin-akhi shall quit the house in the presence of Nebo-akhi-iddin. The witnesses (are) Kabitya, the son of Tabnea, the son of Egibi; Tabik-zira, the son of Nergal-yusallim, the son of Sin-karabi-isime; Nebo-zira-ibni the son of Ardia; and the priest Bel-akhi-basa, the son of Nebo-baladhsu-iqbi. (Dated) Babylon, the 21st day of Nisan, the 5th year of Nabonidus king of Babylon.[57]

51. 8 Holdsworth 453-459.
52. Jenks, *Short History of English Law* (1912) 53.
53. 2 Holdsworth 253; 3 *id.* at 465; 16 Encyc. Soc. Sci. 340.
54. Wigmore, *Panorama* 69. See also, 11 Encyc. Soc. Sci. 332.
55. Wigmore, *Panorama* 69-70.
56. 2 Encyc. Brit. 863. On installment buying in the time of Sargon, see Finegan, *Light from the Ancient Past* (Princeton 1946) 39.
57. Kocourek and Wigmore, *op. cit. supra* note 6, at 694.

The mortgage that Billy signed started out "THIS INDENTURE made and entered into this first day of June, 1942." "Indenture" didn't make him think of his dentist or "*dens*", meaning "tooth". Nor did he know that this word has been used for nearly six hundred years because of an early device to guard against forgery or fraud in the making or alteration of documents. The ancient Chaldeans had guarded against such dangers by covering the sealed tablet evidencing a conveyance with a second layer of clay upon which they traced an exact copy of the original deed. If a dispute arose because an alteration in the visible text was alleged or suspected, the case tablet was broken before witnesses and the deed verified by the edition preserved inside.[58] So in the Middle Ages conveyancers hit upon the device of the indenture. The deed was written in duplicate upon the same piece of parchment, and the two deeds were then separated by a jagged cut or tear passing through a word such as "*chryographum*". In case of dispute the two copies, one of which had been retained by each party, were placed together along the irregular edge. If the tooth-like projections (hence "indenture") fitted then the copies were considered genuine.[59] The mortgage, as in the case of Roman mortgages, contained a clause authorizing the holder of the mortgage to sell the real estate in case of default, first giving notice however. And no matter what the provision for all loss of Billy's rights immediately on default, and even though on the face of it the mortgage appeared to transfer title, the law gave him a period of redemption after default and sale. This was similar to a principle of Roman law for the protection of the debtor,[60] and followed a rule established by English courts of equity in the sixteenth century.[61]

Clay Tablets, Stone Pillars Ancient Recording Devices

Billy's mortgage was recorded in the office of the Register of Deeds so as to give notice to the world that the land was mortgaged. This was a substitute for the ancient Greek method of putting up a stone pillar on the land inscribed with the name of the lender and the amount of the loan.[62] The recording system itself, also applied to deeds, was well known in the ancient world. The Chaldeans copied all important deeds three times on their clay tablets. Each of the parties kept one copy; the third was deposited with a royal notary.[63] So also many of the Greek cities had established offices of public record.[64] In Assyria to protect the purchaser of real estate against claims of third persons it was required that he should make public pronouncement of his proposed acquisition, through the towncrier, three times within the previous month. Any claim not made within this period was disallowed.[65] The recording system was an improvement since it allowed the prospective purchaser, as today, to search the public record for mortgages, liens or other claims to the title. In ancient Rome recordation before public notaries was frequent and in 472 the Emperor Leo provided that, if a mortgage were publicly recorded, it would have priority over others not recorded.[66]

Billy was unable to pay his mortgage because of a depression. The legislature however passed a moratorium act permitting an extension of the time of payment of mortgages. The act, like earlier legislation, most noticeably English statutes during the reign of Henry VIII, was preceded by a series of resounding whereases which "walked before" or were a preamble to the statute. These purported to give the factual basis or justification for the act, but some of the whereases were far from being sober statements of fact. Rather were they more in the nature of editorial arguments justifying or attempting to justify the legislation. This was a device common in the sixteenth century.[67] As to the substance of the moratorium act itself, relief of debtors by statute is at least as old as Solon.[68] And about 86 B.C., in the time of Marius and Sulla, the Roman government as a result of war depression, the loss of Asia and panic was faced with the problem of declaring a moratorium until such time as real estate should recover its normal value or of scaling down debts. So also Julius Caesar in 49 B.C. gave lenders a choice between immediate payment in part and deferred payments in full, at the same time forbidding the hoarding of money in fear of war.[69]

Billy had a tenant who was behind in his rent. As landlord he had a right to distrain the tenant's goods for the rent, one of the oldest forms of self-help known to the law, and regulated as long ago as Justinian. Or it may be that the landlord's right, which was feudal in origin, originated in the fact that in those days each lord of tenants kept a court for these tenants. At any rate, the right continued in the landlord long after he had ceased to possess or hold a court.[70] When the tenant refused to move out Billy brought an action of unlawful detainer against him under a statute of his state similar to one enacted during the reign of Richard II.[71] Billy was in a hurry but found that under another statute legal process, as in the time of Constantine, could not be served on Sunday.[72]

After he got a new tenant Billy made an oral contract to sell the real estate, but the buyer backed out. When Billy consulted a lawyer he

58. Maspro, *Life in Ancient Egypt and Assyria* (N. Y. 1892) 224.
59. Plucknett, 386; 3 Holdsworth 227; 12 *Encyc. Brit.* 147.
60. 3 *Encyc. Soc. Sci.* 33.
61. Plucknett, 394.
62. 4 *Cambridge Ancient History* 34.
63. Maspero, *op. cit. supra* note 58, at 224.
64. Wigmore, *Panorama* 346.
65. 2 *Encyc. Brit.* 865.
66. Radin, *Roman Law* 207. On public registers in Egypt, see Sohm, *op. cit. supra* note 38, at 115, note 2.
67. 4 Holdsworth 460; Johnson, *The Historian and Historical Evidence* (1926) 92; 1 Constant, *The Reformation in England* (1940) *circa* 193; 1 Gasquet, *Henry VIII and the English Monasteries* (6th ed. 1895) 307; *A Discourse upon the Statutes* (Ed. by Thorne: San Marino 1942) 115; 1 Holdsworth 591.
68. Fowler, *The City-State of the Greeks and Romans* (1911) 134. See, however, 20 *Encyc. Brit.* 955 and 4 *Cambridge Ancient History, circa* 43.
69. 9 *Cambridge Ancient History* 265, 502, 512, 655.
70. 3 Holdsworth 281-282.
71. 2 *id.* at 453; 3 *id.* at 27, 280; 4 *id.* at 138.
72. 1 *Cambridge Medieval History* 471.

found that his state had a law in the same words as the English Statute of Frauds of 1677 requiring a written memorandum as a condition to actions on contracts for the sale of realty.[73] Later he conveyed the property by a deed which contained a warranty of title similar to one made in Mesopotamia about 300 B.C. At that time the distinction had already been made between a warranty deed and a quit claim, that is, one that contains no guarantee of title.[74] Billy's deed contained words of feudal origin as a substitute for moving off the land after first going through the necessary processes of handing to the grantee on the land a piece of turf from the land, or a stick, hasp, knife, ring or cross. So to this day a deed does not take effect until its delivery.[75] The "KNOW ALL MEN BY THESE PRESENTS" went back to the Norman conquest. Then followed in medieval style the names of the grantor and grantee, the description and consideration. The words "to have and to hold" were used before 1290; the clause of warranty before 1066. The dating was at the beginning or end as in medieval deeds, the witnesses signed as in Anglo-Saxon, Roman and Babylonian deeds.

Billy's deed contained a tax clause similar to one found in a Roman deed of A.D. 150 from Veturius Valens: "It is further agreed between the parties that Veturius Valens shall pay the taxes due on the said house up to the next assessment."[76] The practice of sealing deeds was introduced into England from Normandy by Edward the Confessor.[77] It may have been that Billy's deed bore no actual seal in the sense of an impression on wax by a signet ring or by fingernails according to a very ancient practice. But it almost certainly contained the words "signed, sealed and delivered" or "in witness whereof the parties of the first part have hereunto affixed their hands and seals." There may have also appeared in the deed, if a printed form, the mystic letters L.S., perhaps in a scroll. This stood for *"locus sigilli"*, the "place of the seal". These are relics of the dwindling significance of the seal from the time that it was the seal that counted rather than the signature. For few men not ecclesiastics could write their names. Anglo-Saxon kings did not sign their charters or grants. There is no royal signature in England before Richard II.[78]

Finally Billy borrowed a friend's automobile for the purpose of going to a city ten miles away. Instead Billy went beyond that city to one many miles further. On learning this his friend, being angered, sued Billy for the value of the car, the action being one called "conversion." The court allowed recovery following a principal laid down in Roman law in 150 B.C.[79]

So, although Billy didn't know it, he could not escape the ancient roots of the law.

73. 6 Holdsworth 384.
74. Wigmore, *Panorama* 65.
75. 3 Holdsworth 223-231.
76. Wigmore, *Panorama* 394.
77. 3 Holdsworth 221-231.
78. 3 *id.* at 231, 417-420; 20 *Encyc. Brit.* 343.
79. Radin, *Roman Law* 102-104.

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